TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 89.

THE TERRITORY OF ARIZONA AT THE RELATION AND TO THE USE OF J. N. GAINES, TAX COLLECTOR IN AND FOR THE COUNTY OF COCHISE, IN THE TERRITORY OF ARIZONA, APPELLANT,

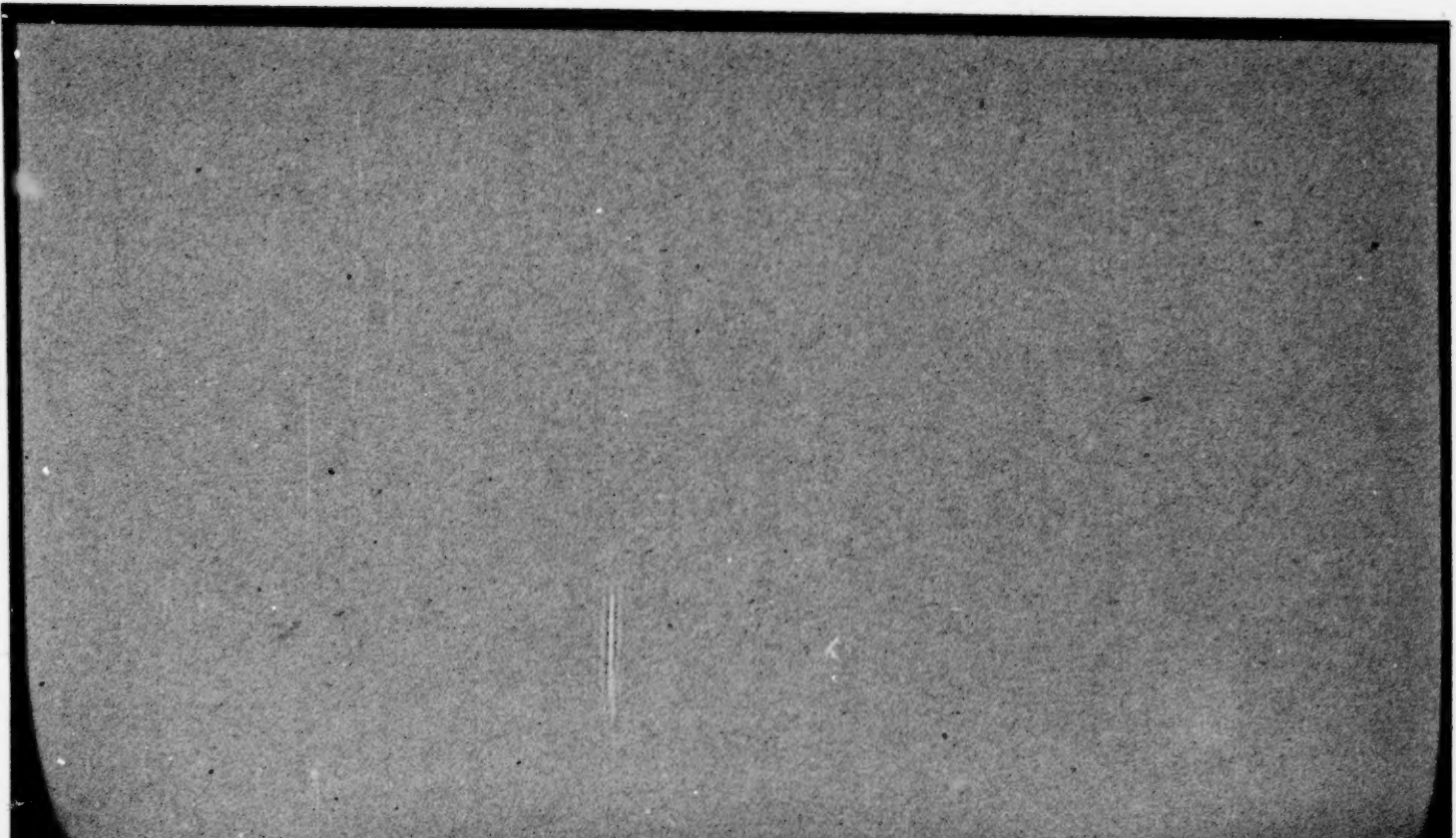
vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED AUGUST 24, 1911.

(22,847)



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a In the Supreme Court of the Territory of Arizona.

No. 1130.

THE TERRITORY OF ARIZONA at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Appellee.

W. G. Gilmore, Esq., H. L. Pickett, Esq., Charles Bowman, Esq., and Harry E. Pickett, Esq., (of the law firm of Pickett, Bowman & Pickett), and E. S. Clark, Esq., attorneys for appellant.
E. E. Ellinwood, Esq., and —— Judson, Esq., and —— Green, Esq., (of the law firm of Judson & Green), attorneys for appellee.

On Appeal from the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

Be it remembered that on to-wit: the fifteenth day of November, 1909, came the appellant in the above entitled cause, by its attorneys, and filed in the clerk's office of said Supreme Court in said entitled cause, a certain Abstract of Record, in words and figures following, to-wit:

1 ABSTRACT OF RECORD.

In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

THE TERRITORY OF ARIZONA at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Complaint.

The Territory of Arizona, who sues in this behalf, at the relation and to the use of J. N. Gaines, Tax Collector, within and for the County of Cochise, in the Territory of Arizona, for cause of action, alleges:

2 I.

That the said Territory is a public corporation, duly created and existing by virtue of law; that the said County of Cochise is one of the political subdivisions of the said Territory, and that J. N.

Gaines, aforesaid, is the duly elected, commissioned, qualified and acting Treasurer and ex-officio Tax Collector in and for the County and Territory aforesaid, and is now engaged in the discharge of his duties as such, under and by virtue of the laws of said Territory.

II.

That on the first Monday in February, 1901, and at all the times herein mentioned, the Copper Queen Consolidated Mining Company was, and now is, a corporation having a place of business in, and doing business in Cochise County, Arizona; and that on the first Monday in February, 1901, said corporation was the owner of and had in its possession and under its control, certain real and personal property situated in said Cochise County, all of which is hereinafter more particularly described. That said property was subject to taxation in said Cochise County for the year 1901.

3

III.

That on or about the 20th day of March, 1901, the said Copper Queen Consolidated Mining Company, made out and caused to be made out a list, signed and sworn to, purporting to be a correct list of the property owned by it, or in its charge, or under its control, subject to taxation in said Cochise County for the year 1901, and delivered the same to the Assessor of said County between the first Monday in February and the first Monday in June, 1901.

IV.

That during the year 1901, the duly qualified and acting Assessor of said Cochise County, between the first Monday in February and the first Monday in June of said year, ascertained that said real and personal property hereinafter mentioned and described was owned by and was under the charge and control of said Copper Queen Consolidated Mining Company; and said Assessor thereupon listed same in the tax list or assessment roll of the said County, and assessed it to and against said Copper Queen Consolidated Mining Company upon pages 55 and 56 of said assessment roll, a description of the said property and the valuations placed thereon by said Assessor for the purpose of assessment being as follows, to-wit:

4

Description—	Property.	Improvements.
Sixty-five (65) patented mining claims near Bisbee, Arizona, as follows:		
Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell,		

	Harrison, Iron Monster, Little New York, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hamilton, Wood Chopper, White Tail Deer, Bisbee, Belle, Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia.		
5	Said mining claims consisting of 636 acres assessed at.....	$3,180.00	
	The improvements thereon consisting of store building, warehouses, hospital building, office and doctor's residence, being assessed at.....		$55,431.00
	Three houses, Nos. 48, 49 and 50, first district, 196 feet frontage on south side of Main street in Bisbee, extending from Copper Jack mining claim, west end line, in a westerly direction, on which are located doctor's office and library building.....	4,960.00	7,800.00
	Twenty feet on north side of Main street, store No. 6.....	200.00	750.00
	One hundred and six feet frontage on north side of Main street, extending from Copper Jack claim, west end line, in a westerly direction, fenced in as park and not occupied by any building except fire hose house, in Bisbee	1,060.00	
	Superintendent's dwelling, etc., 112 first district	1,000.00	2,000.00
	"The Bessemer," No. 111, first district	300.00	3,000.00
6	Lot, 26-1000 of an acre.....	250.00	
	Part of lot, 78-1000 of an acre..	750.00	
	Part of lot, 57-1000 of an acre.....	500.00	
	Improvements thereon.....		1,000.00
	Store at Naco.....	2,340.00	
	Household Furniture.....	1,200.00	
	Library	300.00	
	Piano	100.00	
	Merchandise at Naco.....	13,875.00	
	Merchandise at Bisbee.....	76,480.00	
	Safe and office furniture.....	1,500.00	
	Twenty work horses at $20 each.....	400.00	

Wagons, etc.	610.00	
Harness, etc.	195.00	
Lumber and logging	11,568.00	
Hoisting works, etc.	44,641.00	
Smelting works	112,451.00	
Mill, mine, smelter, supplies, coke and coal	5,073.00	
Surveyors' instruments	125.00	
Assay outfit	100.00	
Cars and car track	6,000.00	
	289,158.00	78,981.00

Total valuation, $368,139.00.

V.

That on or before the third Monday in June, 1901, said Assessor completed his said list or assessment roll, containing the assessment of the property of the Copper Queen Consolidated Mining
7 Company, as aforesaid, and attached his certificate thereto and delivered the same to the Clerk of the Board of Supervisors of said County, and said assessment roll was thereupon filed by said Clerk, who forthwith gave notice of said filing, and specifying in said notice the time of the meeting of the Board of Equalization of Cochise County, by publication in a newspaper published in said County; and thereafter said Clerk kept said tax list or roll open for public inspection.

VI.

That thereafter, on the first day of July, 1901, the Board of Supervisors of said Cochise County, sitting as a Board of Equalization, convened at the County Court House in the County Seat of said County, and continued in session from day to day until and including the 20th day of July, 1901; that during said session, said Board determined, from the information then possessed by it, that the assessed valuation of certain property of said Copper Queen Consolidated Mining Company, as returned by said Assessor, was too small, and found it necessary to add to said assessed valuation, whereupon the Clerk of said Board, at its direction, gave notice to said Copper Queen Consolidated Mining Company, by a letter deposited in the postoffice at Tombstone, in said County, that said Board would, on the 17th day of July, 1901, act in said case
8 and upon said matter of increasing said assessment. That on said 17th day of July, 1901, said Copper Queen Consolidated Mining Company appeared before said Board of Equalization; and upon the hearing and consideration of said matter, said Board determined to and did change and correct the valuation of said property of said Copper Queen Consolidated Mining Company, in said assessment roll, as returned by said Assessor, by adding thereto, as follows:

To the valuation of patented mines, and improvements	$3,260,000.00
To the valuation of stock and merchandise	203,520.00
To the valuation of surveyors' instruments	375.00
To the valuation of horses	400.00
To the valuation of assayers' outfit	600.00

And the Clerk of said Board of Equalization noted upon the assessment roll all of said changes so made by the Board, as aforesaid. That the total assessment of said Copper Queen Consolidated Mining Company, after said equalization, amounted to the sum of $3,833,034.76.

VII.

That immediately after the adjournment of said Board of Equalization, in July, 1901, the Board of Supervisors of Cochise
9 County, caused the Clerk of said Board to make an abstract in duplicate of the assessment roll, as provided in Paragraph 2655, Revised Statutes of 1887, one copy of which abstract said Clerk filed in the office of said Board and transmitted the other forthwith to the Territorial Auditor.

VIII.

That on the 12th day of August, 1901, the Territorial Board of Equalization, at its annual August meeting, held at the office of the Territorial Auditor, in Phœnix, fixed the rate of taxes for Territorial purposes, to be levied and collected in each County in Arizona for said year, at one dollar and seventeen cents on each one hundred dollars valuation of taxable property. And said Territorial Board of Equalization during said meeting, did also equalize the rate of assessment in the various counties of the Territory of Arizona; and a statement of the changes, if any, which were made in the assessment of Cochise County by the Territorial Board of Equalization for the said year, 1901, was duly certified to the Clerk of the Board of Supervisors of Cochise County, by the Territorial Auditor as required by law. That said equalized assessment roll was thereafterwards corrected and adjusted and the valuation thereon duly extended as so equalized, by and in accordance with the decision of the Territorial Board of Equalization and the Board of Equalization of said Cochise County.

10 IX.

That on or before the fourth Monday in August, in said year, the Territorial Auditor transmitted to the Board of Supervisors of Cochise County, a statement of said rate of taxes to be levied and collected within said County for Territorial purposes for said year.

X.

That on the fourth Monday in August, 1901, the Board of Supervisors of said Cochise County levied upon the real and personal

property in said Cochise County a tax of two dollars and three cents upon each one hundred dollars of taxable property in said County for County purposes, and added thereto the levy made by the Territorial Board of Equalization for Territorial purposes as aforesaid, making a total levy upon each one hundred dollars of taxable valuation in said County for Territorial and County purposes for said year 1901, of three dollars and twenty cents. Said Board then caused the columns of valuation in said tax roll to be added up, and entered the total valuation of each description of property on said roll, and thereupon caused a true copy of said assessment roll to be made, which copy constituted and was styled the "Duplicate Assessment Roll" of Cochise County for said year, with Territorial
11 and County taxes and totals of taxes to each person or name carried out in separate columns, and caused the several taxes therein to be footed up, and thereupon gave to the County Treasurer a statement thereof. The chairman of said Board of Supervisors thereupon annexed to said duplicate assessment roll, under his hand, a warrant commanding the Tax Collector to collect from the several persons named in said roll the several sums mentioned in the last column of said roll, opposite their respective names, on or before the third Monday of December then next. Said duplicate assessment roll was delivered to the Tax Collector of said Cochise County on or before the third Monday of September of said year. That the taxes so assessed and levied against said Copper Queen Consolidated Mining Company were entered upon said duplicate assessment roll upon pages 56 and 57 thereof.

XI.

That the Tax Collector of said County, immediately after his receipt of the duplicate assessment roll aforesaid, published an official notice, specifying:

First: That the duplicate assessment roll of Cochise County for the year 1901 was in his possession for the collection of the taxes levied therein.

Second: That said taxes would be delinquent on the third Monday of December next thereafter, and unless paid on that date or
12 prior thereto, five per cent would be added to the amount thereof as penalty.

Third: The time and place at which payment of taxes might be made.

That said notice was published once a week for four consecutive weeks in a newspaper published weekly in said County.

XII.

That the total amount of taxes levied as aforesaid against said property of the Copper Queen Consolidated Mining Company for the year 1901 amounted to the sum of $122,657.09; that on the 9th day of September, 1901, said Copper Queen Consolidated Mining Company paid to the Tax Collector on account of said taxes, in partial payment thereof the sum of $14,133.12. That on the third

Monday of December, 1901, the taxes remaining due on said property of said Copper Queen Consolidated Mining Company became delinquent, and said Tax Collector, at the close of his official business on that day, entered upon the duplicate assessment roll a statement that he had make a levy upon all property therein assessed, the taxes upon which had not been paid, and he thereupon ascertained
13 the total amount of taxes then delinquent, including the delinquent taxes of the Copper Queen Consolidated Mining Company aforesaid, and filed in the office of the Treasurer of said County a statement of said amount, duly verified. And thereupon said Tax Collector made out a list of all persons and property then owing any taxes, duly verified, which list he completed on or before the last day of December of said year, which said list was known as the "Delinquent List" of Cochise County for the year 1901. That the delinquent taxes of said Copper Queen Consolidated Mining Company aforesaid, were entered on said "delinquent list" by said Tax Collector. That a schedule or tax bill, showing the year for which said taxes are due, as well as the several kinds of taxes or funds to which they are due, with the amount due to each fund, is hereto attached, marked "Exhibit A," and made a part hereof.

XIII.

That on the first day of March, 1902, said Copper Queen Consolidated Mining Company paid to the Tax Collector of said Cochise County, as part payment of said delinquent taxes the sum of $9,132.64, leaving a balance then due and unpaid of $99,391.33. That during the year 1903 the Tax Collector of Cochise County returned to the Board of Supervisors of said County all delinquent and forfeited lists of tax bills of real estate in his hands, except taxes
14 due prior to the year 1888, including the said delinquent taxes of the said Copper Queen Consolidated Mining Company. That thereafter, the Clerk of the Board of Supervisors of said Cochise County made up in a book, called the "Back Tax Book," a correct list, in numerical order, of all tracts of land and town lots on which back taxes were then due, in said Cochise County, including therein the lands and other property assessed as aforesaid to said Copper Queen Consolidated Mining Company, and all the back taxes of said Copper Queen Consolidated Mining Company, for the year, 1901, to-wit the sum of $99,391.33; setting forth that on the first day of October, 1903, there had accrued as interest on said delinquent taxes the sum of $18,221.74, and that there had accrued as Clerk's fees for entering said back taxes the sum of $17.00, making a total of $117,630.07; all of which was then wholly unpaid, as the same appears from the said back tax book, and from Exhibit A hereto attached.

XIV.

That thereupon the Clerk of the Board of Supervisors delivered said completed back tax book to the Tax Collector of said Cochise County. That on the first day of January, 1904, all of said back

taxes of said Copper Queen Consolidated Mining Company,
15 together with interest, penalties and cost remained unpaid, and all of said lands and town lots and other real estate mentioned and described in said assessment, remained unredeemed, and that on the 8th day of June, 1904, said taxes, penalties and interest amounted to $125,700.79. And that on said 8th day of June, 1904, the said Copper Queen Consolidated Mining Company paid to the Tax Collector of said Cochise County as part payment of said delinquent and back taxes the sum of $5,661.44, leaving a balance then due and unpaid of $120,039.35. And since said date it has not paid or caused to be paid, nor has anyone paid or caused to be paid in its behalf, any other or further sum or sums of money whatsoever in payment of said delinquent or back taxes; and that there is now due and unpaid on account of said back taxes the sum of $120,039.35, together with lawful interest at the rate of ten per cent per annum from the 8th day of June, 1904, penalties and costs including an attorney's fee of twenty-five per cent of the amount to be actually collected hereunder and paid into the County Treasury of Cochise County; all of which is a lien upon the lands and real estate owned by and assessed against said Copper Queen Consolidated Mining Company for the year 1901 as hereinbefore set forth.

16

XV.

That the following schedule shows the year for which taxes are due upon the within described property, as well as the several amounts of taxes or funds to which they are due, with the respective amounts due to each fund, exclusive of interest, penalties and costs.

Territory and County Taxes, Year 1901.

Total taxes on Real Estate and Improvements		$99,391.33
Total Territorial Taxes	$36,339.96	
Total County Taxes	63,051.37	
Total all Taxes		$99,391.33

Total Amount Due Each County Fund.

General County Fund	$36,029.35
County School Fund	14,287.50
County Interest Redemption Fund	3,727.18
County Bond Redemption Fund	8,075.55
County Road and Bridge Fund	931.79
Total County Taxes	$63,051.37

17

XVI.

That heretofore, to-wit, on the 8th day of January, 1908, the aforesaid J. N. Gaines, Tax Collector of said Cochise County, entered into an agreement with and engaged, employed and designated W. G.

Gilmore, an attorney-at-law, residing and practicing within said Cochise County, to do and perform all the necessary legal work in collecting the delinquent taxes then entered, shown and appearing on the books of the Tax Collector of said County, including the back tax books of said County, which said appointment was by the Board of Supervisors of said Cochise County, under and by virtue of an order entered upon its minutes on the 12th day of February, 1908, duly approved. That under and by virtue of which said appointment, employment and agreement, it was provided that the said W. G. Gilmore should have and receive as compensation for the services aforesaid the sum of twenty-five per cent of such amount as might actually be collected and turned into the County Treasury of Cochise County, which said agreement was by said Board of Supervisors on the 12th day of February, 1908, by an order duly entered in its minutes, approved and ratified.

XVII.

That all of said taxes so assessed and levied as aforesaid
18 for said year 1901, in the amount aforesaid and against said described tracts, lots and parcels of land and other property are still delinquent and unpaid, together with interest, penalties, attorney's fees, Tax Collector's commissions, and all other fees, costs and charges lawfully chargeable, accrued or accruing thereon or therein: including four per cent upon the amount found due from the defendant in this action, as fees of the Tax Collector, and twenty-five per cent of the amount found due from the defendant in this action as attorney's fees herein.

Wherefore, plaintiff prays judgment against the defendant for the sum of $120,039.35, the total amount of the taxes, interest and clerk's fees delinquent and due on said 8th day of June, 1904.

2. For interest thereon at the rate of ten per cent per annum from said 8th day of June, 1904, until paid.

3. For four per cent upon the amount found to be due in this action as fees of the Tax Collector.

4. For twenty-five per cent upon the aggregate amount found due as aforesaid as and for attorney's fees herein.

19 5. Together with all further lawful and proper costs of this action.

6. That the said judgment, and the whole thereof, be adjudged and decreed to be a first and paramount lien upon such of the aforesaid described, lots, tracts, and parcels of land and real estate as the Court may from the proof adjudge to be subject to a lien for said taxes, in favor of the Territory of Arizona, to the end that the lien of the Territory for said delinquent and back taxes, costs, interest, clerk's fees, Tax Collector's fees, and charges, upon said lots, tracts, or parcels of land and real estate may be foreclosed, and that said real estate, or so much thereof as may be necessary to satisfy said judgment, interest, penalties, attorney's fees, Tax Collector's commission and other costs and charges, together with accruing costs and interest, be sold at public auction in manner and form as provided by law for ordinary sales under execution, so that the Terri-

tory of Arizona and the County of Cochise recover the amount and proportion of said back taxes, to which each of them is lawfully and equitably entitled, and for such further relief as to the Court may seem just and equitable.

W. G. GILMORE,
Attorney for Plaintiff.

PICKET & BOWMAN,
Of Counsel.

20 TERRITORY OF ARIZONA,
County of Cochise, ss:

W. G. Gilmore, being first duly sworn, on his oath deposes and says: That he is the tax attorney of Cochise County, Arizona, and the attorney for the plaintiff on the foregoing action; that he has read the foregoing complaint and knows the contents thereof, and that the allegations of the same are true in substance and in fact.

W. G. GILMORE.

Subscribed and sworn to before me this 12th day of February, 1908.

GEO. B. WILCOX, *Clerk.*
[SEAL.] PHILO WILCOX, *Deputy.*

Endorsements on Complaint: Filed Feb. 12, 1908.

[Title of Court and Cause.]

Motion to Strike.

21 Comes now the defendant, Copper Queen Consolidated Mining Company, a corporation, by its attorneys, Herring, Sorin & Ellinwood, and moves the Court to strike from the complaint of the plaintiff the following:

(1) The words "and personal," as the same appear in the seventh line of paragraph II of said complaint;

(2) The word "and personal," as the same appear in the fourth line of paragraph IV of said complaint;

(3) The words and figures contained in said paragraph IV of said complaint from the seventy-third line thereof, as follows:

Household furniture	1,200.00
Library	300.00
Piano	100.00
Merchandise at Naco	13,875.00
Merchandise at Bisbee	76,480.00
Safe and office furniture	1,500.00
Twenty work horses at $20 each	400.00
Wagons, etc.	610.00
Harness, etc.	195.00
Lumber and lagging	11,568.00
Hoisting works, etc.	44,641.00

Smelting works		112,451.00
	Mill, mine, smelter supplies, coal and coke	5,073.00
22	Surveyor's instruments	125.00
	Assay outfit	100.00
Cars and car track		6,000.00

(4) The words and figures contained in paragraph VI of said complaint, from the twenty-third to the twenty-sixth lines, inclusive, as follows:

To the valuation of stock and merchandise	203,520.00
To the valuation of surveyors' instruments	375.00
To the valuation of horses	400.00
To the valuation of assayers' outfit	600.00

Because the same, and each thereof, are irrelevant matter inserted in said complaint, this, that the above entitled action is brought under and by virtue of Act No. 92 of the Laws of 1903, being an Act entitled "An Act to Amend Chapter VII of Title LXII of the Revised Statutes of Arizona, 1901, entitled 'Collection of Delinquent Taxes;'" and that said Act relates only to actions brought to enforce the payments of taxes found to be due upon real estate, and to enforce the lien of the Territory for taxes unpaid upon any real estate; and has no application to the collection of delinquent or unpaid taxes upon personal property.

23 Wherefore, the defendant prays that the matters hereinbefore set forth may be stricken from the complaint of the plaintiff as irrelevant matter inserted therein.

HERRING, SORIN & ELLINWOOD,
Attorneys for the Defendant.

Filed March 6, 1908.

[Title of Court and Cause.]

Amended Answer.

Plea in Abatement.

Comes now the defendant, Copper Queen Consolidated Mining Company, a corporation, by Herring, Sorin & Ellinwood, its attorneys, and, answering the complaint of the plaintiff by way of plea in abatement of the suit, says:

That on the 7th day of June, 1904, the validity of the tax or fund sued for in the above entitled action, was being contested in the proper courts of the Territory of Arizona, and afterward, on said 7th day of June, 1904, the Board of Supervisors of the County of Cochise, Territory of Arizona, directed that the said tax or fund, the validity of which was being contested in the courts as aforesaid, be omitted from any suit brought or to be brought under Chap-

24 ter VII of Title LXII, Revised Statutes of Arizona, 1901, as amended by Act No. 92 of the Laws of 1903, and that at

no time prior to the bringing of this action, nor at any time, nor at all, has the said Board of Supervisors of said County and Territory directed that an action be brought for such omitted tax.

Wherefore, defendant prays that said suit may abate, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

First Special Demurrer.

Comes now the defendant, Copper Queen Consolidated Mining Company, by its attorneys, Herring, Sorin & Ellinwood, and, answering the complaint of the plaintiff by way of special demurrer, specially demurs to that part of paragraph IV of said complaint, which reads as follows:

"That during the year 1901, the duly qualified and acting assessor of said Cochise County, between the first Monday in February and the first Monday in June of said year, ascertained that said real and personal property hereinafter mentioned and described was owned by and was under the charge and control of said Copper Queen Consolidated Mining Company; and said assessor thereupon listed same in the tax list or assessment roll of said county, and assessed it to and against said Copper Queen Consolidated Mining Company upon pages 55 and 56 of said assessment roll, a description of said property and the valuations placed thereon by said assessor for the purpose of assessment, being as follows, to-wit:

Description—	Property.	Improvements
Sixty-five (65) patented mining claims near Bisbee, Arizona, as follows: Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Master, Little New York, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle, Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia.		
Said mining claims consisting of 636 acres assessed at..		$3,180.00

And for grounds of special demurrer says that the same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that the description of each of the several tracts and lots of real estate is so vague and indefinite that no valid judgment can be rendered to enforce

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the lien against any of said tracts or lots of land attempted to be described therein.

(2) Because it appears upon the face thereof that sixty-five separate and distinct tracts or parcels of real estate, to-wit: sixty-five separate and distinct patented mining claims, were not separately listed and assessed, but were listed and assessed and set down upon the tax assessment roll of said county as one parcel or tract of land, and thus assessed to defendant; that the said sixty-five patented mining claims, being separate and distinct tracts
27 or parcels of land, were not separately valued, and the amount of taxes on each separately set down and assessed against the same, but that the whole sixty-five patented mining claims were valued as an entirety and in gross at the sum of $3,180.00; that no valid judgment can be rendered describing the land upon which the taxes are found to be due and stating the amount of taxes and interest found to be due upon each tract or lot to the rendition thereof, and decreeing that the lien of the Territory be enforced against each such tract and lot of real estate to the amount of taxes due thereon.

(3) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(4) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendant prays the judgment of the Court as to the sufficiency of said part of said paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Second Special Demurrer.

And for further answer to the complaint of the plaintiff,
28 by way of special demurrer, the defendant specially demurs to that part of paragraph IV of said complaint which reads as follows:

"The improvements thereon consisting of store building, warehouses, hospital building, office and doctor's residence, being assessed at $55,431.00."

And for grounds of special demurrer says that the same is insufficient in law upon the face thereof:

(1) Because said part of paragraph IV above set forth, and said complaint, fail to show upon what tracts or lots of real estate, if any, said store building, said warehouses, said hospital building, said office and said doctor's residence are situate; and because it appears upon the face thereof that the description of the several improvements therein set forth is so vague and uncertain that no valid judgment can be rendered to enforce a lien against any said tract or lot of land for the taxes on said improvements.

(2) Because it appears upon the face thereof that said store building, said warehouses, said hospital building, said office and

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said doctor's residence were not separately assessed and listed as improvements upon any separate tract or lot of real estate, and were not separately valued, and the amount of taxes upon
29 each separately set down and assessed against the same or any said tract or lot of real estate; but the same were valued as an entirety and in gross at the sum of $55,431.00 without reference to any particular tract or lot of real estate; and because thereof no valid judgment can be rendered for taxes upon said improvements against any tract or lot of real estate, nor can any valid decree be entered declaring a lien to exist in favor of the Territory for the amount of the alleged tax on said improvements against any tract or lot of real estate, as required by law.

(3) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(4) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendant prays judgment of the Court as to the sufficiency of said part of paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

30 *Third Special Demurrer.*

And for further answer to the complaint of the plaintiff by way of special demurrer, the defendant specially demurs to that part of paragraph IV of said complaint, which reads as follows:

"Three houses numbers 48, 49 and 50, first district, 196 feet frontage on south side of Main street in Bisbee, extending from Copper Jack Mining Claim, west end line, in a westerly direction, on which are located doctor's office and library building	4,960.00	7,800.00"

And for grounds of special demurrer says that the same is insufficient in law and upon the face thereof:

(1) Because it appears upon the face thereof that the description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against the said tract or lot of land attempted to be described therein.

(2) Because it appears upon the face thereof that said houses 48, 49 and 50 were not separately assessed as improvements upon any separate tract or lot of real estate and were not separately valued, and the amount of taxes on each separately set down and assessed against the same or any said tract or lot of real estate; but the
31 same were valued as an entirety and in gross without reference to any particular tract or lot of real estate; and because

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thereof no valid judgment can be rendered for taxes upon said houses 48, 49 and 50 against any tract or lot of real estate, nor can any valid decree be entered declaring a lien to exist in favor of the Territory for the amount of the alleged tax on said houses 48, 49 and 50 against any tract or lot of real estate.

(3) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(4) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendants prays the judgment of the Court as to the sufficiency of said part of said paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Fourth Special Demurrer.

32 And for further answer to the complaint of the plaintiff by way of special demurrer, the defendant specially demurs to that part of paragraph IV of said complaint which reads as follows:

"Twenty feet on north side of Main Street,
store No. 6 ..... 200.00 750.00"

And for grounds of special demurrer says that the same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that the description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein.

(2) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(3) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendant prays the judgment of the Court as to the sufficiency of said part of said paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

33 *Fifth Special Demurrer.*

And further answering said complaint by way of special demurrer, the defendant specially demurs to that part of paragraph IV of said complaint which reads as follows:

"One hundred and six feet frontage on north side of Main Street,

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extending from Copper Jack claim, west end line, in a westerly direction, fenced in as park and not occupied by any building except fire hose house, in Bisbee, 1,060.00"

And for grounds of special demurrer says that the same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that the decription of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot attempted to be described therein.

(2) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(3) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

34 Wherefore, defendant prays the judgment of the Court as to the sufficiency of said part of paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Sixth Special Demurrer.

And further answering said complaint of the plaintiff by way of special demurrer, the defendant specially demurs to that part of paragraph IV of said complaint which reads as follows:

"Superintendent's dwelling, etc., 112, first district..... 1,000.00 2,000.00"

And for grounds of special demurrer says that the same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that the description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot so attempted to be described therein.

(2) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

35 (3) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendant prays judgment of the Court as to the sufficiency of said part of said paragraph IV of said compiaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Seventh Special Demurrer.

And further answering said complaint of the plaintiff by way of special demurrer, the defendant specially demurs to that part of paragraph IV of said complaint which reads as follows:

"The Bessemer, No. 111, first district..... 300.00 3,000.00"

And for grounds of special demurrer says that same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that the description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot attempted to be described therein.

36 (2) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(3) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendant prays the judgment of the Court as to the sufficiency of said part of paragraph IV of said complaint, and *the* costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Eighth Special Demurrer.

And further answering said complaint of the plaintiff, by way of special demurrer, the defendant specially demurs to that part of paragraph IV of said complaint which reads as follows:

"Lot, 26-1000 of an acre..... 250.00"

And for grounds of special demurrer says that same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that the description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against

37 said tract or lot attempted to be described therein.

(2) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(3) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendant prays the judgment of the Court as to the

sufficiency of said part of said paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorney- for Defendant.

Ninth Special Demurrer.

And further answering the complaint of the plaintiff by way of special demurrer, the defendant specially demurs to that part of paragraph IV of said complaint which reads as follows:

"Part of lot 78-1000 of an acre..... 750.00"

And for grounds of special demurrer says that the same is insufficient in law upon the face thereof:

38 (1) Because it appears upon the face thereof that the description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein.

(2) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(3) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendant prays the judgment of the Court as to the sufficiency of said part of paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Tenth Special Demurrer.

And further answering the complaint of the plaintiff by way of special demurrer, the defendant specially demurs to that part of paragraph IV of said complaint which reads as follows:

"Part of lot, 57-1000 of an acre..... 500.00"

39 And for grounds of special demurrer says that same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that the description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot attempted to be described therein.

(2) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(3) Because it appears upon the face thereof that the alleged

taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendant prays the judgment of the Court as to the sufficiency of said part of said paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Eleventh Special Demurrer.

And further answering said complaint of the plaintiff by way of special demurrer, defendant specially demurs to that part of
40 paragraph IV of said complaint which reads as follows:

"Improvements thereon..... 1,000.00"

And for grounds of special demurrer says that same is insufficient in law upon the face thereof:

(1 Because it appears upon the face thereof that the description of said improvements is so vague and uncertain that it is impossible to tell where or upon what tract of real estate, if any, the same are situate; or in connection with what tract or lot of real esta-e they should be assessed, if at all, and because thereof the said part of paragraph IV of said complaint does not show a valid assessment against said or any of said improvements; and no valid judgment can be rendered for the amount of said alleged taxes against any tract or lot of real estate, or otherwise; and no proper decree can be entered declaring a lien to exist in favor of the Territory against any tract or lot of real esta-e for the amount of said pretended taxes on improvements or any part thereof.

(2) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(3) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings with-
41 out legal authority and wholly nugatory and void.

Wherefore, defendant prays the judgment of the Court as to the sufficiency of said part of said paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Twelfth Special Demurrer.

Further answering the said complaint of the plaintiff by way of special demurrer, defendant specially demurs to that part of paragraph IV of said complaint which reads as follows:

"Store at Naco ..... 2,340.00"

And for grounds of special demurrer says that same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that the description of the real estate attempted to be listed and assessed for taxation in said part of said paragraph is so vague and uncertain that no valid judgment can be rendered for the amount of said alleged taxes against any tract or lot of real estate, and no valid decree can be entered declaring a lien to exist in favor of the Territory against any tract or lot of real estate for the amount of said alleged
42 taxes or any part thereof.

(2) Because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes therein sued for.

(3) Because it appears upon the face thereof that the alleged taxes therein sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendant prays the judgment of the Court as to the sufficiency of said part of said paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Thirteenth Special Demurrer.

Further answering said complaint of the plaintiff by way of special demurrer, the defendant specially demurs to that part of paragraph IV of said complaint which reads as follows:

Household furniture	1,200.00
Library	300.00
Piano	100.00
Merchandise at Naco	13,875.00
43 Merchandise at Bisbee	76,480.00
Safe and office furniture	1,500.00
Twenty work horses at $20 each	400.00
Wagons, etc.	610.00
Harness, etc.	195.00
Lumber and lagging	11,568.00
Hoisting works, etc.	44,641.00
Smelting works	112,451.00
Mill, mine, smelter supplies, coal and coke	5,073.00
Surveyors' instruments	125.00
Assay outfit	100.00
Cars and car track	6,000.00

And for grounds of special demurrer, says that the same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that the above entitled action is brought under and by virtue of Act No. 92 of the Laws of 1903, being an Act entitled "An Act to amend Chapter VII of Title LXII of the Revised Statutes of Arizona, 1901, entitled 'Collection of Delinquent Taxes;'" and that said Act relates only to actions brought to enforce the payment of taxes found to be due

upon real estate, and to enforce the lien of the Territory for taxes unpaid upon any real estate; and has no application to the collection of delinquent or unpaid taxes upon personal property.

44 (2) Because it appears upon the face thereof that the alleged taxes sued for are founded upon proceedings without legal authority and wholly nugatory and void.

Wherefore, defendant prays judgment of the Court as to the sufficiency of said part of paragraph IV of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Fourteenth Special Demurrer.

Further answering the said complaint of the plaintiff by way of special demurrer, defendant specially demurs to that part of paragraph VI of said complaint which reads as follows:

"* * * said Board determined, from the information then possessed by it, that the assessed valuation of certain property of said Copper Queen Consolidated Mining Company, as returned by said assessor, was too small, and found it necessary to add to said assessed valuation, whereupon the Clerk of said Board, by its direction, gave notice to said Copper Queen Consolidated Mining Company, by letter deposited in the postoffice at Tombstone, in said County, that said Board would, on the 17th day of July, 1901, act in said case and upon said matter of increasing said assessment.

That on the 17th day of July, 1901, said Copper Queen

45 Consolidated Mining Company appeared before said Board of Equalization and upon its hearing and consideration of said matter, said Board determined to and did change and correct the valuations of said property of said Copper Queen Consolidated Mining Company, in said assessment roll, as returned by said assessor, by adding thereto, as follows:

"To the valuation of patented mines and improvements ..... 3,260,000.00"

And for grounds of special demurrer says that the same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that there is nothing to show a proper description of each of said patented mining claims, the same being separate and distinct tracts or lots of real estate, and the amount for which each thereof was originally set down and assessed for taxation by the assessor of said County, enabling the said Board of Equalization to equalize the assessment on each of said tracts or lots of real estate by adding thereto or deducting therefrom, if, in its judgment from the information then possessed by it, the value fixed in the assessment, was too small or too large, as required by law.

46 (2) Because it appears upon the face thereof that there is nothing to show upon what tracts or lots of real estate, or mining claims, the said raise in valuation was made, or what pro-

portion of said added valuation of $3,260,000.00 was added to the valuation of each of said mining claims, respectively; and it is impossible to tell from said part of said paragraph what proportion of said added valuation was added on account of land and what proportion thereof was added on account of improvements thereon, and said part of said paragraph fails to show the nature of said improvements and describe the tracts or lots of land upon which the same are located, respectively.

(3) Because it appears upon the face thereof that said Board did not first ascertain the amount for which each of said tracts or lots of real estate or patented mining claims had been listed or assessed to the defendant for taxation, if at all, by the said assessor, and then proceed to equalize the assessed valuation of each thereof, respectively, by adding to or deducting from the valuations placed upon each of said tracts or lots of real estate by said assessor, so as to show the amount for which the land and improvements embraced within each of said tracts or lots of real estate had been originally assessed, and the amount which was added to or deducted from each of said tracts, and the improvements thereon, in
47 equalizing the same, but added to the assessed valuation of said sixty-five patented mining claims and improvements (the same being separate and distinct tracts or lots of real estate), in gross, the sum of $3,260,000.00.

(4) Because it appears upon the face thereof that no valid judgment can be rendered describing the land upon which the taxes, based upon said alleged equalization, are found to be due, and stating the amount of said taxes and interest found to be due upon each tract or lot up to the rendition thereof, and decreeing that the lien of the Territory be enforced against each such tract and lot of real estate to the amount of taxes, as equalized, due thereon.

(5) Because it appears upon the face thereof that said added valuation mentioned in said part of said paragraph is founded upon proceedings without legal authority and upon proceedings wholly nugatory and void.

Wherefore, defendant prays the judgment of the Court as to the sufficiency of said part of said paragraph VI of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

48 *Fifteenth Special Demurrer.*

Further answering the said complaint of the plaintiff by way of special demurrer, the defendant specially demurs to that part of paragraph VI of said complaint, which reads as follows:

"To the valuation of stock and merchandise..... 203,520.00"

And for grounds of special demurrer says that the same is insufficient in law upon the face thereof:

(1) Because it appears upon the face thereof that it is impossible to tell whether said added valuation was added to the original

assessed valuation of defendant's stock of merchandise alleged to have been owned at Naco, Arizona, or that alleged to have been owned at Bisbee, Arizona.

(2) Because it appears upon the face thereof that said Board of Equalization did not separately equalize the valuation placed by said assessor on the stock of merchandise alleged to have been owned by the defendant at Naco, Arizona, and the valuation placed by said assessor on the stock of merchandise alleged to have been owned by the defendant at Bisbee, Arizona, but added the said sum of $203,520.00 to both of said stocks of merchandise, in gross.

49 (3) Because no valid judgment can be rendered describing the merchandise upon which said taxes, based upon said alleged equalization, are found to be due, and stating the amount of said taxes and interest thereon found to be due up to the rendition thereof, and decreeing that a lien exists in favor of the Territory against any tract or lot of real estate for the amount thereof.

(4) Because it appears upon the face thereof that said added valuation of $203,520.00 is founded upon proceedings without legal authority and upon proceedings wholly nugatory and void.

Wherefore, defendant prays the judgment of the Court as to the sufficiency of said part of paragraph VI of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Sixteenth Special Demurrer.

And for further answer to the said complaint of the plaintiff by way of special demurrer to the whole of said complaint, the defendant hereby specially demurs thereto upon the ground that the same is insufficient in law upon the face thereof and because the facts therein stated do not constitute a cause of action against the defendant:

50 (1) Because it appears upon the face thereof that the above entitled action is brought under and by virtue of Act No. 92 of the Laws of 1903, being an Act entitled "An Act to amend Chapter VII of Title LXII of the Revised Statutes of Arizona, 1901, entitled 'Collection of Delinquent Taxes;'" and that said Act and the whole thereof is in conflict with and in violation of the Act of Congress of July 30, 1886, entitled, "An Act to prohibit the passage of local or special laws in the Territories of the United States, to limit Territorial indebtedness, and for other purposes," commonly known as the Harrison Act, wherein it is provided:

"The Legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:

* * * * * * *

For the assessment and collection of taxes for Territorial, County, Township or Road purposes."

(2) Because it appears upon the face thereof that the above entitled action is brought under and by virtue of Act No. 92 of the

Laws of 1903, being an Act entitled "An Act to amend Chapter VII of Title LVII of the Revised Statutes of Arizona, 1901, entitled 'Collection of Delinquent Taxes;'" and that said Act, and the whole thereof, is in conflict with and in violation of the Fourteenth
51 Amendment to the Constitution of the United States, which declares:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And said Act is also in conflict with the laws of the United States.

Wherefore, defendant prays the judgment of the Court as to the sufficiency of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

General Demurrer.

Comes now the defendant, and by its attorneys, Herring, Sorin & Ellinwood, answering the complaint of the plaintiff by way of general demurrer thereto, hereby generally demurs to said complaint and for grounds of general demurrer says that said complaint does not state facts sufficient to constitute a cause of action against said defendant.

Wherefore, defendant prays judgment of the Court as to
52 the sufficiency of said complaint, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

Further answering said complaint of the plaintiff by way of answer, defendant says:

I.

It admits all of the matters and things set forth in paragraph I of said complaint.

II.

Answering paragraph II of said complaint, defendant admits that on the first Monday in February, 1901, and at all times therein mentioned, the Copper Queen Consolidated Mining Company was, and now is, a corporation having a place of business and doing business in Cochise County, Arizona; and that on said first Monday in February, 1901, said corporation was the owner of, and had in its possession and under its control, certain real and personal property situate in said Cochise County which was subject to taxation in said County for the year 1901; but denies that said real and personal property is described particularly, or at all, in said complaint; and defendant alleges that on the first Monday in February, 1901, the real estate in Cochise County which was owned by defendant, consisted of sixty-five separate and distinct tracts or parcels of real estate,
53 to-wit: sixty-five separate and distinct located, monumented, surveyed and patented mining claims, many of which were

non-contiguous, the patents to each and all of which containing a description of said mining claims, respectively, by metes and bounds, the survey number, were, on said date, duly of record in the office of the County Recorder of said Cochise County, Arizona; and the defendant further alleges that the pretended description of the real and personal property referred to in paragraph II of plaintiff's complaint as being thereinafter more particularly described and set out in paragraph IV of said complaint, is so vague, uncertain and indefinite that the defendant is unable to identify and locate the same therefrom; nor is it possible for any person to locate and identify said real and personal property from said pretended description.

III.

Answering paragraph III of said complaint, defendant denies that on or about the 20th day of March, 1901, or at all, the defendant made out and caused to be made out a list signed and sworn to purporting to be a correct list of the property owned by it, or in its charge or under its control, subject to taxation in said Cochise County for the year 1901, and delivered the same
54 to the assessor of said County between the first Monday in February and the first Monday in June, 1901; but defendant states the fact to be that on or about the month of March, 1901, said defendant made out and delivered to the assessor of said County a brief memorandum or list of real and personal property owned by the defendant and subject to taxation for the year 1901; that said list or memorandum did not contain, nor did it purport to contain, any definite or certain description of the several separate and distinct tracts or lots of real estate or mining claims therein mentioned, but that the same was made out and returned to the assessor as an aid to the assessor in discovering said real estate to the end that he might properly enter the same upon the assessment roll of said County for said year by proper description to be found in the office of the County Recorder of said County, or elsewhere; and to the further end that each of said separate tracts or lots of real estate and mining claims might be separately valued and assessed.

IV.

Answering paragraph IV of said complaint, the defendant denies that said assessor legally valued, listed and assessed in the tax list or assessment roll of said county for the year 1901, to and against said Copper Queen Consolidated Mining Company, upon pages 55 and 56 of said assessment roll, or at all, any real estate;
55 but defendant admits that between the first Monday in February and the first Monday in June of said year said assessor placed upon the tax list or assessment roll of said County the words and figures as set forth in paragraph IV of said complaint, but denies that the same constitutes any assessment.

V.

Answering paragraph V of said complaint, defendant denies that the completed tax list or assessment roll made by said assessor for the year 1901 contained a valid assessment of the real estate of the Copper Queen Consolidated Mining Company, and denies that the said assessor attached his certificate to said assessment roll and delivered the same to the Clerk of the Board of Supervisors as set forth in said paragraph, or at all; and as to the other matters and things contained in said paragraph V of said complaint, defendant says that it has no information or belief as to the truth or falsity thereof, and, placing its denial on that ground, denies the same.

VI.

Answering paragraph VI of said complaint, defendant admits that on the first day of July, 1901, the Board of Supervisors of said Cochise County, sitting as a Board of Equalization, convened
56 at the County Court House in the County Seat of said County, and continued in session from day to day until and including the 20th day of July, 1901; and defendant admits that the Clerk of said Board gave notice to said Copper Queen Consolidated Mining Company as alleged in said paragraph of said complaint, and that on the 17th day of July, 1901, said Copper Queen Consolidated Mining Company appeared before said Board; but defendant denies that said Board determined to and did change and correct the valuations of any property of the Copper Queen Consoliated Mining Company in said assessment roll by adding thereto, as set forth in said paragraph VI, and defendant denies that the total assessment of said Copper Queen Consolidated Mining Company, at any time during said year, amounted to the sum of $83,833,034.76.

VII.

Answering paragraph VII of said complaint, defenadnt says that it has no information or belief as to the matters and things therein set forth other than as contained in said complaint, and, placing its denial on that ground, denies the same.

VIII.

Answering paragraph VIII of said complaint, defendant says that it has no knowledge, information or belief concerning the matters in said paragraph alleged, except as shown by said
57 complaint, and, placing its denial on that ground, denies the same.

IX.

Answering paragraph IX of said complaint, defendant says that it has no knowledge, information or belief concerning the matters in said paragraph alleged except as shown by said complaint, and, placing its denial on that ground, denies the same.

X.

Answering paragraph X of said complaint, defendant says that it has no knowledge, information or belief concerning the matters in said paragraph alleged, except as shown by said complaint, and, placing its denial on that ground, denies the same.

XI.

Answering paragraph XI of said complaint, defendant says that it has no information, knowledge or belief concerning the matters in said paragraph alleged, except as shown by said complaint, and, placing its denial on that ground, denies the same.

58

XII.

Answering paragraph XII of said complaint, defendant admits that on the 9th day of September, 1901, said Copper Queen Consolidated Mining Company paid to the Tax Collector on account of taxes the sum of $14,133.12; and defendant denies each and every other allegation contained in said paragraph XII of said complaint.

XIII.

Answering paragraph XIII of said complaint, defendant admits that on or about the first day of March, 1902, the Copper Queen Consolidated Mining Company paid to the Tax Collector of said Cochise County the sum of $9,132.64 on account of taxes for the year 1901; and defendant admits that during the year 1903 the Tax Collector of Cochise County returned to the Board of Supervisors of said County all delinquent and forfeited lists of tax bills of real estate in his hands except taxes due prior to the year 1888; but denies that said delinquent or forfeited lists of tax bills of real estate so returned included any delinquent taxes against said Copper Queen Consolidated Mining Company; and defendant denies each and every other allegation in said paragraph XIII of said complaint contained.

59

XIV.

Answering paragraph XIV of said complaint, defendant says that it has no information, knowledge or belief, other than by reference to said complaint, as to whether the Clerk of the Board of Supervisors thereupon, or at all, delivered said completed back tax book to the Tax Collector of said Cochise County, as in said paragraph alleged, and, placing its denial on that ground, denies the same; and the defendant admits that since the 8th day of June, 1904, it has not paid, nor has it at any other time, or at all, paid or caused to be paid any sum or sums of money whatsoever for or on account of delinquent or back taxes, except defendant paid the said sum of $9,132.64 as aforesaid; and as to each, every and all of the other matters in said paragraph XIV contained, the defendant denies the same.

XV.

Answering paragraph XV of said complaint, defendant says that it has no knowledge, information or belief concerning the matters in said paragraph alleged, except by reference to said complaint, and, placing its denial on that ground, denies the same.

60

XVI.

Answering paragraph XVI of said complaint, defendant says that it admits the allegations contained in said paragraph.

XVII.

Answering paragraph XVII of said complaint, defendant says that it has no knowledge, information or belief concerning the matters in said paragraph alleged, except by reference to said complaint, and, placing its denial on that ground, denies the same.

XVIII.

Further answering said complaint of the plaintiff, this defendant denies each, every, all and singular the allegations in said complaint contained save and except such as are hereinabove expressly admitted.

XIX.

Further answering said complaint of the plaintiff, by way of answer, the defendant alleges:

That heretofore, and prior to the first day of September, 1901, suit was instituted in the District Court, now the Second Judicial District of the Territory of Arizona, in and for the County
61 of Cochise, by the defendant herein, Copper Queen Consolidated Mining Company, as plaintiff, against M. D. Scribner, County Treasurer and ex-officio Tax Collector of Cochise County, and the County of Cochise, as defendants; that the said Scribner was the predecessor in office of the said J. N. Gaines, Treasurer and ex-officio Tax Collector of the County of Cochise, Arizona, at whose relation and to whose use the above entitled action is brought, wherein an injunction was issued out of said District Court upon the application of said Copper Queen Consolidated Mining Company, plaintiff in said suit, restraining and enjoining the defendants and each of them from collecting, or attempting to collect, from the Copper Queen Consolidated Mining Company, for taxes for the year 1901, any sum in excess of $14,133.12; that thereafter, at the December, A. D. 1901, term of said Court, at the trial of said action, the payment of said sum was tendered by said Copper Queen Consolidated Mining Company, plaintiff in said suit, for said amount of taxes, to said Tax Collector, and said sum was received and accepted by him for said amount of taxes; that at the termination of said trial in the month of December, 1901, said Copper Queen Consolidated Mining Company, plaintiff in said suit, had judgment in said action in its favor and against the defendants, and that by said

judgment it was ordered, adjudged and decreed by said Court
62 that said defendants in said action, the County of Cochise, and M. D. Scribner, Treasurer and ex-officio Tax Collector, and each of them, their and each of their attorneys, agents and employees, be, and they were thereby perpetually enjoined and restrained from collecting, or attempting to collect from the Copper Queen Consolidated Mining Company for taxes for the year 1901, any taxes upon the sum of $3,150,000.00, the same being wrongfully added by the Board of Equalization of said County of Cochise to the assessed valuation of the property of the Copper Queen Consolidated Mining Company for the year 1901, or from collecting, or in any manner attempting to collect from the plaintiff in said action, Copper Queen Consolidated Mining Company, for taxes for the year 1901, any sum in excess of $9,132.64, in addition to what had already been paid by said Company, together with the sum of 5 per cent thereon, making in all the sum of $9,589.27; and that a writ of injunction issued out of the Clerk's office, under the seal of said Court, perpetually enjoining and restraining the said defendants, the County of Cochise, and M. D. Scribner, Treasurer and ex-officio Tax Collector, their and each of their attorneys, agents and employés, as therein ordered; that thereafter, the plaintiff in said suit, Copper Queen Consolidated Mining Compa*id*, paid into the treasury of the said County of Cochise, the said sum of $9,589.27, which sum
63 was received and accepted for said amount of taxes by said M. D. Scribner, Treasurer and ex-officio Tax Collector; and that thereafter, on the 25th day of January, 1902, in accordance with the final decree of said Court made and entered in said cause on the 23rd day of December, 1901, an injunction was duly issued by the Clerk of said Court, under the seal of said Court, and his official hand, directed to the County of Cochise and M. D. Scribner, County Treasurer and ex-officio Tax Collector, restraining them and each of them, their and each of their attorneys, agents and employés, from collecting or attempting to collect the taxes attempted to be assessed against said company upon the sum of $3,150,000.00 found by the Court to have been wrongfully added to the valuation of its property, and commanding them and each of them, their attorneys, agents and employés to wholly desist from collecting, or attempting to collect, from Copper Queen Consolidated Mining Company, for taxes for the year 1901, any sum in excess of the sum of $9,589.27, which said injunction was duly served upon each of said defendants upon the 25th day of January, 1902; that thereafter, the said County of Cochise and M. D. Scribner, Treasurer and ex-officio Tax Collector, appealed from said judgment to the Supreme Court of the Territory of Arizona; and that thereafter said Supreme Court of the Territory of Arizona reversed the judgment of the District Court of Cochise County aforesaid, and among other things held in
64 substance that the decree of said District Court should have enjoined the collection only of so much of the taxes assessed as were based upon an over-valuation of said company's property, and reversed the lower court, and remanded said cause for a new trial; that thereafter said action remained pending in said District

Court until the 25th day of June, 1904, and said injunction remained operative and in force until the 26th day of March, 1904, restraining said defendants and each of them, their attorneys, agents and employés, from collecting, or in any manner attempting to collect any sum over said amount for taxes for the year 1901.

And defendant further alleges that on or about the 7th day of June, 1904, the Copper Queen Consolidated Mining Company, the plaintiff in said suit, and M. D. Scribner, Treasurer and ex-officio Tax Collector of said County of Cochise, and the County of Cochise, by its Board of Supervisors thereunto duly authorized, made and entered into a compromise and settlement of said suit, in pursuance of which the said company paid into the treasury of said County the sum of $5,000.00 in full satisfaction and payment of the costs and expenses incurred by the defendants in said suit and of the fees agreed to be paid by said Board of Supervisors of said County to its attorneys in said cause; and said plaintiff further paid into the treasury of said County, in pursuance of said compromise
65 and settlement, the sum of $661.44, making a total of $5,666.44; and it was thereupon stipulated, agreed and confessed by said M. D. Scribner, County Treasurer and ex-officio Tax Collector as aforesaid and said Board of Supervisors of said County of Cochise for and in behalf of said County, that said amount so paid by said company, to-wit, the sum of $5,000.00 and the sum of $661.44, were and forever should be deemed a full payment, satisfaction and acquittance of any and all sums of money due or to become due from said company in any manner whatsoever for or on account of taxes levied and assessed against said company for the year 1901; and that said company be, and the same was thereby forever released and discharged from the payment of any other sum in the premises for or on account of taxes for the year 1901; that said settlement and compromise was a settlement and compromise made by and between said Copper Queen Consolidated Mining Company and said D. M. Scribner, Treasurer and ex-officio Tax Collector of Cochise County and said Cochise County by its Board of Supervisors, at a meeting of said Board duly held; and that said Board at said meeting duly adopted and entered upon its minutes a resolution fully embodying said settlement and compromise; and defendant further alleges that no sum is now due, owing or payable from said Copper Queen Consolidated Mining Company to said County of Cochise for or on account of taxes
66 for the year 1901; that thereafter, on or about the 16th day of June, 1904, relying upon said compromise and settlement, and in accordance therewith, and at the special instance and request of the said defendants, M. D. Scribner, Treasurer and ex-officio Tax Collector of Cochise County, and said Cochise County, the plaintiff in said suit, Copper Queen Consolidated Mining Company, filed its certain motion to dismiss said action then pending as aforesaid, the same appearing upon the docket of said District Court as Case No. 2239, and that thereafter, on the 25th day of June, 1904, said motion came on for hearing, and it was by said Court ordered and duly entered of record in the minutes of said Court that said cause No. 2239, entitled Copper Queen Consolidated Mining Company vs.

Cochise County, et al., be, and the same is hereby dismissed; and that since said last mentioned date no further proceedings have been had or taken in said action.

XX.

And further answering the said complaint of the plaintiff by way of answer, the defendant alleges:

That the defendant is a corporation under the laws of the State of New York and engaged in the mining business in the Territory of Arizona, and is protected by Sec. 15 of the Organic Act of
67 the Territory of Arizona against discriminating and unequal taxation, in that it is provided by said section that the land or other property of non-residents shall not be taxed higher than the land or other property of residents. And defendant says that this equality of taxation required by the organic law of the Terrttory requires equality in valuation as well as in the rate of taxation.

Defendant says that the action of the Board of Equalization of Cochise County, Arizona, set forth in the complaint in what is termed the increase of assessment of the Silver Spray Mine, the Holbrook Mine, the Copper Queen Mine, the Copper Jack Mine, the Baxter Mine, the Atlantic Mine, the Dividend Mine and the Rucker Mine, and on the improvements thereon on said respective mines, was not only void in law, as an assessment of said several properties, for the reason that there was no valid assessment upon any one of said separate properties to which the said several increases could lawfully attach, but that said attempted increases were wholly without warrant of law and were fraudulent in law in this, that the same were made knowingly and wilfully in violation of the uniform system of valuation of that class of property theretofore adopted and continually enforced by the Board of Equalization in the assessment of properties of that class in said County and of the assessment of said properties of that class in other counties.

68 The several properties referred to by said names were patented mining claims, and in view of the recognized uncertainty of determining the cash value of such properties, growing out of the uncertainty and speculative character of the mining business, the custom had been established in this and other counties of the Territory to fix the cash value of such mining claims at the uniform rate of Five Dollars per acre; and this custom of assessment was not occasional but habitual and had been acquiesced in and enforced by the assessing officers and by the Board of Equalization and also acquiesced in by the mine owners of the Territory. The assessment roll of Cochise County, Arizona, included, for the year 1901, several hundred mining claims assessed upon this basis, and this was the uniform rule adopted throughout the Territory, and had been for many years in the assessment of this class of property.

The Board of Equalization of this county made no investigation whatever to determine the value of said mining claims, nor did it hear any evidence thereon. Defendant says that the action of the Board in this matter was for the purpose of placing an unfair and

undue burden upon the defendant, discriminating against this defendant, so that this defendant will be compelled to pay more than its share of its just taxes for the year 1901, and so that the property of the defendant should be taxed higher than the property of others, including residents of the Territory. Defendant says that
69 this inequality in valuation thus attempted, by the Board of Equalization of Cochise County was intentional, and made with the purpose of and with the necessary effect of placing upon this defendant an unequal burden of taxation compared with residents of the Territory, and with other owners of the same class of property.

Defendant says that as it has paid its full share of taxation upon the said valuation of its property made in accordance with the valuation of other properties of the same class in the Territory, *and* that the amount sued for in this petition is based upon said illegal attempt to place upon this defendant an unequal burden of taxation.

Defendant says that the action of the said Board of Equalization was not only violative of the organic law of the Territory, but also violative of the Fourteenth Amendment to the Constitution of the United States, in denying to this defendant the equal protection of the laws.

XXI.

And further answering the said complaint of the plaintiff by way of answer the defendant alleges that the defendant is a corporation under the laws of New York and engaged in the mining business in the Territory of Arizona, and is protected by Sec. 15 of the Organic Act of the Territory against discriminating and un-
70 equal taxation, in that it is provided by said section that the land or other property of non-residents shall not be taxed higher than the land or other property of residents. Defendant says that this equality of taxation required by the organic law of the Territory requires equality in valuation as well as in the rate of taxation.

Defendant says that the action of the Board of Equalization of Cochise County, Arizona, set forth in the complaint in what is termed the increase of assessment of the Silver Spray Mine, the Holbrook Mine, the Copper Queen Mine, the Copper Jack Mine, the Baxter Mine, the Atlantic Mine, the Dividend Mine and the Rucker Mine, and on the improvements thereon in said respective mines, was not only void in law, as an assessment of said several properties, for the reason that there was no valid assessment upon any one of said separate properties to which the said several increases could lawfully attach, but that said attempted increases were wholly without warrant of law and were fraudulent in law in this, that the same were made knowingly and wilfully in violation of the uniform system of valuation of that class of property theretofore adopted and continually enforced by the Board of Equalization in the assessment of properties of that class in said county and of the assessment of said properties of that class in other counties.

71 The several properties referred to by said names were patented mining claims, and in view of the recognized un-

certainty of determining the cash values of such properties, growing out of the uncertainty and speculative character of the mining business, the custom had been established in this and other counties of the Territory, to fix the cash value of such mining claims at the uniform rate of Five Dollars per acre; that this system of assessment was not occasional, but habitual, and had been acquiesced in and enforced by the assessing officers and by the Board of Equalization and also acquiesced in by the mine owners of the Territory. The assessment roll of Cochise County, Arizona, for the year 1901, included several hundred mining claims assessed upon this basis, and this was the uniform rule adopted throughout the Territory, and had been for many years in the assessment of this class of property. The Board of Equalization of this County made no investigation whatever to determine the value of said mining claims, nor did it bear any evidence thereon. Defendant says that the action of the Board in this matter was for the purpose of placing an unfair and undue burden upon this defendant, discriminating against this defendant, so that this defendant will be compelled to pay more than its share of its just taxes for the year 1901, and so that the properties of the defendant should be taxed higher than the property of others, including residents of the Territory.

72 Defendant says that his inequality in valuation thus attempted by the Board of Equalization of Cochise County was intentional and made with the purpose of and necessary effect of placing upon this defendant an unequal burden of taxation as compared with residents of the Territory, and with other owners of the same class of property.

Defendant says that not only was this attempted increase unlawful and fraudulent, in that it was made for the purpose of discriminating against the defendant, and of making it bear unequal burdens of taxation as compared with residents of the Territory, and owners of the same class of property, but that it was also illegal and void in that the valuation thus placed was in excess of the then cash value of said properties, according to the standard fixed by the laws of Arizona, and was an excessive and over-valuation of said properties.

Defendant says that it has paid its full share of taxation upon the said valuation of its property made — accordance with the valuation of other porperty of the same class in the Territory, and that the amount sued for in this petition is based upon said illegal attempt to impose upon this defendant an unequal burden of taxation.

Defendant says that the action of the said Board of Equalization was not only violative of the organic law of this Territory, but was also violative of the Fourteenth Amendment to the Consti-

73 tution of the United States, in denying to this defendant the equal protection of the law.

Wherefore, having fully answered, the defendant prays that it may go hence without day, and for costs.

HERRING, SORIN & ELLINWOOD,
Attorneys for Defendant.

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TERRITORY OF ARIZONA,
County of Cochise, ss:

Walter Douglas, being first duly sworn, on oath deposes and says: That he is the General Manager and agent of the Copper Queen Consolidated Mining Company, defendant in the foregoing action; that he has read the foregoing amended answer and knows the contents thereof, and that the same is true in substance and in fact.

WALTER DOUGLAS.

Subscribed and sworn to before me this 17th day of November, 1908.

My commission expires July 9, 1910.

[SEAL.] JOHN BOLER,
Notary Public in and for Cochise County, Arizona.

Filed this 18th day of November, 1908, at 12 o'clock m.

74 [Title of Court and Cause.]

Reply of the Plaintiff to the Amended Answer of the Defendant.

Comes now the above named plaintiff, by its attorneys, W. G. Gilmore, Tax Attorney, and Pickett & Bowman and E. S. Clark, of counsel, and demurs to the Plea in Abatement contained in the Amended Answer of the above named defendant.

I.

Upon the ground and for the reason that said Plea in Abatement does not state facts sufficient to constitute a cause of abatement to the said action.

Wherefore, plaintiff prays the judgment of the Court as to the sufficiency of the said Plea in Abatement.

W. G. GILMORE, *Tax Attorney.*
PICKETT & BOWMAN,
E. S. CLARK,
Attorneys for the Plaintiff.

II.

Further replying to the Amended Answer of the defendant, the plaintiff denies each and every, all and singular the allega-
75 tions contained in the said Plea in Abatement.

Wherefore, the plaintiff prays judgment in favor of the plaintiff upon the said Plea in Abatement.

W. G. GILMORE, *Tax Attorney.*
PICKETT & BOWMAN,
E. S. CLARK,
Attorneys for the Plaintiff.

III.

And for further reply to said Amended Answer of the defendant, the plaintiff demurs to the said Amended Answer upon the ground and for the reason that the same does not state facts sufficient to constitute a defense to the complaint of the plaintiff in this action.

Wherefore, plaintiff prays judgment of the Court as to the sufficiency of said Amended Answer, and for costs.

W. G. GILMORE, *Tax Attorney.*
PICKETT & BOWMAN,
E. S. CLARK,
Attorneys for Plaintiff.

76 TERRITORY OF ARIZONA,
Cochise County, ss:

Charles Bowman, being first duly sworn, deposes and says he is one of the attorneys for the plaintiff in the foregoing named action; that he has read the foregoing reply to the Amended Answer of the defendant and knows the contents thereof; that the same is true in substance and in fact.

CHARLES BOWMAN.

Subscribed and sworn to before me this the 23rd day of November, A. D. 1908.

[SEAL] GEO. B. WILCOX, *Clerk.*

Filed Nov. 23, '08, 9:30 a. m.

[Title of Court and Cause.]

Motion to Strike.

Comes now the plaintiff above named, and moves the Court to strike from the Amended Answer of the defendant the following:

All of Paragraphs Twenty (XX) and Twenty-one (XXI) therein contained because the same and every part thereof consists of irrelevant and immaterial matter.

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W. G. GILMORE, *Tax Attorney.*
PICKETT & BOWMAN,
E. S. CLARK,
Attorneys for the Plaintiff.

Filed Nov. 23, '08, 9:30 a. m.

[Title of Court and Cause.]

Opinion by the Trial Court.

This is a special statutory proceeding brought under Act 92 of the Laws of 1903 to enforce the lien for the unpaid taxes upon the property mentioned in the complaint, for the amount of taxes due thereon as shown by the back tax book, and set forth in the tax bill of back taxes, which is filed with the petition in this case, and which

is made prima facie evidence that the amount claimed in the suit is just and correct.

Section 88 of the Act under which this suit is brought provides that "the judgment, if against the defendant, shall describe the land upon which the taxes are found to be due; shall state the amount of the taxes and interest found to be due upon each tract or lot, and shall decree that the lien of the Territory shall be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest and costs be sold, and execution shall
78 be issued thereon, which shall be executed as in other cases of judgment and execution, and the said judgment shall be the first lien upon said land."

The complaint alleges that in the year 1901 the Assessor listed in the tax list or assessment roll of the county the real and personal property therein mentioned and described, and assessed it to and against the defendant, a description of said property and the valuation placed thereon, being in part as follows, to-wit: "Description, 65 patented mining claims near Bisbee, Arizona, as follows:" (Names 65 patented mines) "said mining claims consisting of 636 acres assessed at $3,180. The improvements thereon, consisting of store buildings, warehouses, hospital building, office and doctor's residence, being assessed at $55,431." That on the 17th day of July, 1901, the Board of Equalization did change and correct the valuation of said property in said assessment roll as returned by said Assessor, by adding thereto as follows: "To the value of patented mines and improvements, $3,260,000. * * *"

That the total assessment of said Copper Queen Consolidated Mining Company, after said equalization amounted to the sum of $3,833,034.76.

That the Board of Supervisors afterward levied upon the real and personal property the taxes for the year 1901 of $3.20 per one
79 hundred dollars valuation, and caused the columns in the valuation of the tax roll to be added up into the total valuation of each description of property, caused a true copy to be made of said assessment roll, which copy constituted and styled the duplicate assessment roll. The Chairman of said Board annexed to said duplicate assessment roll under his hand a warrant demanding the Tax Collector to collect from the several persons named in the said roll the several sums mentioned in the list of columns of said roll on or before the third Monday of December.

That the said taxes so assessed and levied against the said Copper Queen Consolidated Mining Company were entered upon the said duplicate assessment roll upon pages 56 and 57 thereof. That the total amount of taxes levied as aforesaid against said property of said Copper Queen Company for the year 1901 amounted to the sum of $122,657.09. That on the 9th of September, 1901, the Copper Queen Company paid to the Tax Collector on account of said taxes in partial payment thereof, the sum of $14,133.12. That on the third Monday in December, 1901, the tax then due on said property of said company became delinquent, and the said Tax Collector at the close of his official business on that day entered upon the dupli-

cate assessment roll a statement that he made a levy upon all property therein assessed, the taxes upon which had not been paid,
80 and he thereupon ascertained the total amount of taxes then delinquent, including the delinquent taxes of the Copper Queen Company, and filed in the office of the Treasurer of said county a statement of said amount, duly verified. That thereupon the Tax Collector made out a list of all persons and property then owing any taxes, duly verified, which list was known as the delinquent list of Cochise County for the year 1901. That the delinquent taxes of the said Copper Queen Company as aforesaid, were entered on said delinquent list by said Tax Collector; that a schedule or tax bill showing the year for which the taxes were due, as well as the several kinds of taxes or funds, with the amount due each fund "is hereto attached, marked Exhibit A."

That on the first day of March, 1902, said company paid to the Tax Collector as part payment of said delinquent taxes, the sum of $9,132.64, leaving a balance then due and unpaid of $99,391.33. That during the year 1903 the Tax Collector returned to the Board of Supervisors all delinquent and forfeited lists of tax bills of real estate, in his hands, including the said delinquent taxes of the said Copper Queen Company.

That thereafter the Clerk of the Board of Supervisors of said Cochise County made up in a book called the back tax book a correct list in numerical order of all tracts of land on which back
81 taxes were then due in Cochise County, including the lands and other property assessed as aforesaid to said Copper Queen Company, and all the back taxes of the said Copper Queen Company for the year 1901, to-wit: The sum of $99,391.33, all of which was then wholly unpaid.

That on the first day of January, 1904, all of said back taxes of said Copper Queen Company, with interest, penalties and costs remained unpaid, and all the said lands and other real estate mentioned and described in said assessment remained unredeemed, and that on the 8th of June, 1904, said taxes, penalties and interest amounted to $125,700.79.

That on the 8th of June, the Copper Queen Company paid as part payment of said delinquent and back taxes the sum of $5,661.44, leaving a balance then due and unpaid of $120,039.35. That since that date it has not paid or cause to be paid any other or further sums of money whatsoever in payment of said delinquent or back taxes, and that there is now due and unpaid on account of said back taxes the sum of $120,039.35, with interest, penalties and costs, all of which is a lien upon the lands and real estate owned by and assessed against the said Copper Queen Company for the year 1901, as hereinbefore set forth.

82 That all of said taxes so levied and assessed as aforesaid for the year 1901, and the amount aforesaid and against said described tracts, lots and parcels of land, and other property, are still delinquent and unpaid.

Wherefore, plaintiff prays judgment against said defendant for said sum, and costs, and that the said judgment and the whole

thereof be adjudged and decreed to be a first and paramount lien upon such of the aforesaid lots, tracts and parcels of land as the Court may, from the proof adjudge to be subject to the lien for said taxes in favor of the Territory of Arizona, to the end that the lien of the Territory for the said delinquent and back taxes, costs, interest, fees and charges upon said lots, tracts or parcels of land and real estate, may be foreclosed, and that the said real estate, or so much thereof as may be necessary, to satisfy said judgment, interest, penalties, fees and costs be sold at public auction in manner and form as provided by law for ordinary sales under execution.

The complaint herein asks for judgment for the taxes and foreclosure of the lien upon the tracts of land as mentioned and described in said complaint, and in the back tax bill. The original tax roll that is the basis on which the assessment was levied by the Board of Supervisors in describing the real estate, says: "65 mining claims, as follows:" Then names 67 patented mines, and
83 among those 67 names six mines that are not named in the complaint, and omits four mines that are named in the complaint, and the same valuation, $3,180, as is given to the 636 acres composed of the 65 patented mines named in the complaint. The duplicate assessment roll, to which was attached the warrant to collect the taxes given by the Chairman of the Board of Supervisors, and the roll on which is stated the amount of taxes due from each person, and from each tract of land *or* described therein gives the assessment against the 636 acres valued at $3,180, and the improvement thereon, $55,431, and described the said lands as consisting of the said 65 mines and named 65, and omits from the list four that are named in the complaint, and names in its list four that are not named in the complaint.

After the delivery to the Board of the original tax roll, the Board of Equalization of the county determined that the assessed valuation of certain property as returned by the Assessor was too small, and found it necessary to add to said assessed valuation, and after notice to the company, the Board did on the 17th of July, change and correct the valuation of certain properties of said company as shown by said assessment roll, by adding to the valuation of certain property as follows: To the Silver Spray Mine,
84 $1,000,000; hoisting works on said mine $50,000; Holbrook Mine, $1,000,000; hoist and improvements, $10,000; Copper Queen Mine, $50,000; Copper Jack Mine, $50,000; buildings and improvements, $50,000; Baxter Mine, $250,000; Atlanta Mine, $250,000; Dividend Mine, $350,000; Rucker Mine, $200,000. These and other additions not in issue here raised the total assessed valuation of the property of the Copper Queen Company, after equalization, to $3,833,034.75 as disclosed by said duplicate roll, and the total amount of the taxes levied thereon against the Copper Queen Company was the sum of $122,657.09, but neither the complaint in this case, nor the assessment roll discloses what the total assessed valuation of any individual piece of real estate amounted to, nor what was the amount of taxes due on any of these separate mines or pieces of real estate.

The defendant company objected to the increased valuation, and tendered to the County Treasurer the sum of $14,133.12, the amount of tax that it claimed that it owed on a fair valuation of its property. The Collector declined to receive this amount of money in payment of its taxes, and the company brought suit in this Court against the County Tax Collector to enjoin the collection of any further amount of taxes, and brought into Court the sum of $14,133.12, alleging that it had tendered this, that the tender had been refused, and again tendered the money and paid it into the
85 Court for the use of the county, as evidence of the willingness on its part to do equity, and asked that the county be enjoined from collecting from it any further amount of taxes. The Court held that the increased valuations of eight several mines in the amount of $3,160,000 was invalid, but that the increase in valuation of the hoisting works on the Silver Spray mine, $50,000; on buildings and other improvements, $50,000, and on some other items not — interest here was a valid increase in the amount of $358,895, and that the company was justly chargeable with taxes thereon in the amount of $9,132.65 over and above what it had already paid, and conditional upon its paying said amount with a 5 per cent penalty, enjoined the County Treasurer from collecting any further amount. Upon the payment of this money according to the order of the Court, the injunction was issued, and was afterwards dissolved by order of the Supreme Court. The Tax Collector who declined to receive the first payment in full payment of the taxes, accepted the said money, either from the company *of* the Court and credited the same on account, likewise received the amount paid under order of the Court and credited that on account and entered in each instance a general credit against the total amount due, and failed or refused to apply the amounts, or either of them, to the payment of the taxes on any particular tracts of land or other specific properties.
86 The duplicate assessment roll shows the company charged under different valuations as heretofore given, and others not material in this case, in the amount of $3,833,034, total valuation of property, and $122,657.09, the total tax, credited by $14,133.12 paid on account, and the balance due on December 9, 1901, $108,523.97. At the close of business on the third Monday of December, the Tax Collector turned in the delinquent list, certified to the Board as being a true list of all persons and property owing taxes for that year, which had not been paid, and the amount thereof, on this appears the property of the defendant company, and 65 patented mines containing 636 acres of the vlaue of $3,180 for the real estate, and $55,431 for the improvements thereon, appear on this list, and an additional list or statement shows the general amounts in which the valuation of eight mining claims heretofore mentioned were increased by the Board, giving the amounts of the increase, but not giving either the original valuation of said eight mines or the total valuation of them or any of them as increased. This delinquent roll shows the amount of taxes $122,657.09, credited by payment of account, December 9, 1901, $14,132.12, leaving a balance due of $108,423.97, credit by payment of March 1st, 1902, of

$9,132.64, leaving a balance of original delinquency of $99,391.33. The 65 mines that are named as delinquent and constituting 636 acres include three that are not named in the complaint, and
87 omits three that are named in the complaint; includes two not named in the original tax roll, and omits three that are named therein; includes two not named in the duplicate tax roll, and omits two that are named therein.

Under the law of 1903 the pieces of property thus delinquent that have been forfeited for the non-payment of the taxes were carried into the back tax book, and it is for the foreclosure of the government's lien for taxes on the different parcels of real estate thus appearing in the back tax book that this suit is brought.

We may not in this case render a judgment against the defendant for the amount of unpaid taxes found due. This is not a personal action, but an action in rem. While nominally brought against the defendant, it is really an action against the several pieces of real property for the amount of taxes upon the several pieces of real property due and unpaid, with penalties and costs. This distinction must be borne in mind in determining the two questions that were presented in this case. First, whether there was a valid assessment originally, and second, whether the raises in the valuation made by the Board of Equalization were valid, or were in any instance invalid by reason of having been made arbitrarily, and not upon knowledge of the values or upon evidence relative thereto given before the Board.

In determining the question whether there was a sufficient
88 description of the property to constitute a valid assessment, we must bear in mind that a description of property sufficient to impose upon the owner an obligation to pay the taxes thereon, or to serve as a basis for a money judgment against the owner as a defendant, for which all of his property would be liable under execution, might be insufficient to describe the property with the accuracy necessary to sustain a judgment against the separate tracts of land that constitute such real property for the amount of taxes and penalties due from each separate tract, and therefore to support a decree for the foreclosure on such separate tracts of real property of the lien for taxes in favor of the Government on them. The question is not whether the defendant company owes an amount for taxes to the Government and should pay it, and it is not whether the assessment sufficiently describes the property to collect a debt from the company because of taxes, but whether there is a sufficient description of the several tracts of land with their several valuations, and the amount of taxes severally due upon them to enable such taxes to be recovered by a foreclosure of the lien against such tracts of land. Part of the property returned consisted of 65 patented mines, with an aggregate acreage of 636 acres, valued at $3,180 for the real estate, and $55,431 for the improvements thereon. The valuation of eight of these
89 mines was increased by the Board of Equalization. There was a definite amount of increase added to them, but no ascertainment of the original valuation of said eight mines, or either of them, and no total valuation after the increase. It is a matter of common knowledge that patented mines are not of uni-

form value. It is likewise a matter of common knowledge that they are not of uniform area or acreage. It is therefore impossible to ascetrain the value placed on any of the 65 mines. If we should depend upon the intrinsic value, we have nothing whatever to enable us to fix a certain valuation. If we attempt to fix their values by adopting an acreage valuation, we are left in the same situation. The maximum area of a mining claim is 20 acres. The average acreage of the 65 named here would be a fraction less than ten acres, which advises us that the mines vary in size from perhaps twenty acres, the maximum, to a minimum that is not ascertainable. The only definite valuation presented to us is represented by the several amounts in which eight of these mines were raised in valuation by the Board of Equalization. The effect of this raise was to increase the total valuation of the property, and the taxes levied thereon by adding the amount of the raise to the original valuation, and without a definite original valuation we cannot find a definite total. There were three partial payments made by the defendant, aggregating $23,265.76. Part of these payments were intended by the defendant to be applied to the taxes on certain pieces of
90 property, but they were not so received by the plaintiff, but were all received on account, and credited generally to the entire amount of taxes claimed, therefore it is impossible to ascertain the proportion of these payments that was credited to the definite amount of taxes to the raised valuation of these eight mines, without ascertaining how much of the said payments were applied to the taxes on the other different pieces of property, and therefore how much was left to be applied to the taxes upon the raise or increase in valuation of these eight mines, and as that is ispossible of calculation, we have no means of ascertaining how much yet remains due and unpaid of the taxes levied upon these added values, even if we considered these as separate certain valuations.

It was claimed by the plaintiff that the tax upon all the property on the original valuation or levy was paid by the defendant, and that the only amount in controversy is the amount of the raise, which the defendant claimed to be invalid. This position is not supported by the record. For this to be true would require that the delinquent list and back tax book would contain only the eight mines and the personal property raised.

The complaint herein alleges: "Thereupon the Tax Collector made out a list of all persons and property then owing taxes * * * known as the delinquent list." "That thereafter the Clerk of the Board of Supervisors make up in a book called
91 the back tax book a correct list * * * of all tracts of land on which back taxes were then due." The delinquent list and back tax book, to support the theory of the plaintiff should contain only the eight mines raised, and the unpaid taxes against them for only the amount on the raise, whereas both delinquent list and back tax book contain the entire 65 patented mines (except the additions and omissions made by mistakes in transcription), and declare the taxes to be due and unpaid on all, and ask leave to have the lien foreclosed against all.

The Act provides in Section 86, "that if on the first day of January, 1904, any of said lands or town lots contained in said back tax book remain unredeemed it shall be the duty of the Tax Collector to proceed to enforce the payment of the taxes charged against said tract or lot by suit in courts of competent jurisdiction in the county where the real estate is situate." The back tax book as placed in evidence shows the property of the defendant company, the total valuation of $3,833,034, the total taxes $122,657.09, amount paid on account $23,265.76, balance due $99,391.33, and in enumerating the several tracts or parcels of land thus remaining unredeemed, gives 65 mining claims, containing 636 acres, value of real estate $3,180, improvements thereon $55,431," and named 64 claims. This list omits three, the Silver Bear, the Little Joker and Sunrise, that are named in the original tax roll,
92 and omits one, the Silver Bear, that is named in the duplicate roll. It omits five that are named in the complaint in this case, and names four that are not named in the complaint. It gives the same number of acres for the list named therein as is given in all other lists, the same valuation for both real estate and improvements thereon. It gives the list of the increased valuation of the several mining claims and improvements, and gives no total valuation of said pieces of property after the addition of such increase. The back tax book thus presents 64 distinct tracts or parcels of land described only by their names as separate patented mines as subject to the lien for the unpaid portion of the taxes assessed against the 65 mines that constituted the 636 acres, and the improvements thereon which were returned by the owner and assessed by the Assessor. This list of 64 presented in the back tax book omits three, to-wit: Little Joker, Sunrise and Silver Bear, that were included in the list given by the defendant to the Assessor, and included by the Assessor in the assessment roll on which the tax was levied. The taxes, therefore, that were assessed against these three mines and that remain unpaid (after the application of their proportions of the partial payments) are included in the unpaid taxes that stand upon the back tax book as a lien upon the 64 mines, therein named, in addition to the unpaid taxes of the said 64 mines themselves. There has been no separate valuation given to
93 the said three mines, or either of them, or any statement of the separate amount of taxes due from them, or either of them, to enable the Court to deduct such amount from the total amount appearing against the 636 acres as represented by the 64 mines named. Nor does it appear what part (if any) of the $55,431 improvements upon the mines constituting the said 636 acres may be upon these three mines, or any of them, so that it is absolutely impossible to make any definite calculation of the amount of overcharge against the remaining 64 claims that are named as constituting the entire 636 acres and that stand charged with the entire amount of unpaid taxes that are due, not only upon their separate and respective tracts and the improvements on them, but in addition thereto with the amount that cannot be definitely computed, of the taxes originally assessed against the other three mines named,

and the improvements thereon, which remains unpaid after deducting their proportion of the partial payments entered as general credits against the entire tax, and therefore is now due and is included in the aggregate amount charged in the back tax book against these 64 mines.

This renders it impossible to comply with the requirements of Section 88 of the Act under which this action is brought, and which is cited above. As we are unable by any system of computation to determine the amount of taxes due upon any separate tract
94 or lot of real estate, and describe such tract of land with sufficient accuracy to enable the Sheriff to execute a deed therefor, we cannot render a judgment for the plaintiff in this case. This condition of affairs renders it unnecessary to determine whether the original assessment was valid, or whether the raise in value by the Board of Equalization was or was not valid.

FLETCHER M. DOAN,
Trial Judge.

Filed July 3rd, 1909.
Filed as of April 14th, 1909.

[Title of Court and Cause.]

Judgment.

This cause came regularly on for trial on the 23rd day of November, 1908, W. G. Gilmore, Pickett & Bowman and the Hon. E. S. Clark, Attorney General, appearing as counsel for the plaintiff, and Herring, Sorin & Ellinwood and F. N. Judson for the defendant. A trial by jury having been expressly waived by counsel for the respective parties, the cause was tried before the Court sitting without a jury.

Whereupon, witnesses on the part of the plaintiff and defendant were duly sworn and examined, and documentary evidence
95 introduced by the respective parties, and the evidence being closed, the cause was submitted to the Court for consideration and decision; and after due deliberation thereon the Court orders that judgment be entered herein in favor of the defendant and against the plaintiff.

Wherefore, by reason of the law and the decision aforesaid, it is ordered, adjudged and decreed, that the plaintiff, the Territory of Arizona at the relation and for the use of J. N. Gaines, Tax Collector in and for the County of Cochise, Territory of Arizona, take nothing by reason of its said action, and that the defendant, Copper Queen Consolidated Mining Company, do have and recover of and from the plaintiff its costs and disbursements incurred in this action, amounting to the sum of $59.15.

Done in open Court, this 14th day of April, 1909.

FLETCHER M. DOAN, *Judge.*

Filed this 14th day of April, 1909, at 10 o'clock a. m.

96 [Title of Court and Cause.]

Motion for New Trial.

Comes now the plaintiff, The Territory of Arizona at the Relation and to the Use of J. N. Gaines, Tax Collector of Cochise County, and moves the Court to vacate and set aside the judgment of this Court rendered on the 14th day of April, A. D. 1909, in the above-entitled action, in favor of the defendant and against the plaintiff, and grant the plaintiff a new trial, upon the ground for the reasons following:

I.

Upon the ground that the Court erred in rendering judgment in favor of the defendant and against the plaintiff.

II.

Upon the ground that the Court erred in refusing to render judgment in favor of the plaintiff and against the defendant.

III.

Upon the ground that the Court erred in admitting and rejecting evidence over the objection of the plaintiff.

97 IV.

Upon the ground that the evidence does not sustain the judgment.

V.

Upon the ground that the judgment is contrary to the law and the evidence.

Respectfully submitted,
W. G. GILMORE, *Tax Attorney;*
PICKETT & BOWMAN, *Special Counsel;*
E. S. CLARK, *Attorney General,*
Attorneys for the Plaintiff.

Filed April 14th, 1909.

Minute Entries.

October Term, A. D. 1908.

WEDNESDAY, *October 28th*, 1908.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pursuant to recess at 9.30 a. m.

98 Present:

Hon. Fletcher M. Doan, Judge.
F. W. Shelly, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to law.

5164.

J. N. GAINES, Coll.,
vs.
COPPER QUEEN CONSOLIDATED MINING COMPANY.

By consent of parties herein it is by the Court ordered that this case be and the same is hereby set for Nov. 23rd.

5164.

J. N. GAINES, Coll.,
vs.
COPPER QUEEN CONSOLIDATED MINING COMPANY.

On motion of counsel for defendant it is by the Court ordered that the defendant be allowed to withdraw certain exhibits by filing receipts for them.

October Term, A. D. 1908.

MONDAY, *November 23rd*, 1908.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pur-
99 suant to recess at 9 o'clock a. m.

Present:

Hon. Fletcher M. Doan, Judge.
F. W. Shelly, Dist. Att'y.
J. F. White, Sheriff.
J. W. Walker, Reporter.
Geo. B. Wilcox, Clerk.

Court was duly opened by the officers according to law.

5164.

TERRITORY OF ARIZONA at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation.

This cause came on this day regularly for trial, plaintiff appearing by counsel Attorney General Hon. E. S. Clark, Messrs. Pickett &

Bowman, and W. G. Gilmore, Tax Attorney, and the defendant appearing by counsel Messrs. Herring, Sorin & Ellinwood, Esqs., comes now Colonel Herring, counsel for the defendant, and moves the association of Hon. Frederick N. Judson, Esq., of the Missouri Bar, to practice before the Court in this case; whereupon it is by
100 the Court ordered that Hon. Frederick N. Judson, Esq., be and he is hereby entered as associate counsel for the defendant in this case.

Comes now counsel for the defendant herein and presents motion, duly made and filed herein, to strike from the complaint of the plaintiff on file herein the certain words, figures and allegations, specifically set out in said motion, regarding personal property and the taxes alleged to be due thereon; and the Court having heard argument of counsel for the defendant, and plaintiff, respectively, for and against said motion, and being fully advised in the premises, it is now ordered by the Court that said motion be and the same is hereby granted, and that there be stricken from said complaint all and singular the allegations, words and figures in said complaint contained regarding personal property, and the taxes alleged to be due thereon, to-wit: The words "and personal," as the same appear in the seventh line of paragraph II of said complaint.

The words "and personal" as the same appear in the fourth line of paragraph IV of said complaint.

The words and figures contained in paragraph IV of said complaint from the seventy-third line thereof, as follows:

Household furniture	1,200.00
Library	300.00
Piano	100.00
101 Merchandise at Naco	13,875.00
Merchandise at Bisbee	76,480.00
Safe and office furniture	1,500.00
Twenty work horses at $20 each	400.00
Wagons, etc.	610.00
Harness, etc.	195.00
Lumber and lagging	11,568.00
Hoisting works	44,641.00
Smelting works	112,451.00
Mill, mine, smelter supplies, coal and coke	5,073.00
Surveyors' instruments	125.00
Assay outfit	100.00
Cars and car track	6,000.00

Also the words and figures contained in paragraph VI of said complaint, from the twenty-third to the twenty-sixth lines inclusive, as follows:

To the valuation of stock and merchandise	203,520.00
To the valuation of surveyors' instruments	375.00
To the valuation of horses	400.00
To the valuation of assayers' outfit	600.00

To which ruling of the Court, plaintiff excepts.

102 Comes now counsel for the plaintiff herein and presents motion that defendant's plea in abatement be stricken from files on ground that same was not sworn to, whereupon after argument of respective counsel herein, it is by the Court ordered that motion to strike out on said ground is denied. Comes now counsel for plaintiff herein and presents demurrer to the plea in abatement herein; whereupon after argument of respective counsel, said demurrer was submitted to the Court for its consideration and decision, and the Court being now fully advised in the premises and having duly considered the same, overrules said demurrer; whereupon the case proceeds as follows: Defendant presents documentary evidence in support of their plea in abatement, and calls as witnesses J. N. Gaines and H. E. Berner, who were duly sworn and examined and cross-examined, and it is by the Court ordered that this case be and the same is hereby continued to 1:30 o'clock p. m. this day.

Court reconvened at 1:30 o'clock p. m. All officers present.

[Title of Cause.]

This cause having been continued to this time and counsel for respective parties being present the case proceeds as follows: Comes now counsel for the defendant and recalls H. E. Berner as witness

103 to the stand, who was examined and cross-examined. Comes now counsel for the defendant and recalls J. N. Gaines, as witness to the stand, who was duly examined and cross-examined. Comes now counsel for the defendant and calls as witness Ben Goodrich, and Geo. B. Wilcox, Esqs., who were duly sworn and examined and cross-examined; whereupon defendant rests as to plea in abatement. Comes now counsel for plaintiff herein and presents motion that the plea in abatement be overruled; whereupon said motion having been referred to the Court for its consideration and decision, and the Court being now fully advised in the premises and having duly considered the same, orders that said plea in abatement be and the same is hereby overruled and dismissed. Comes now counsel for the defendant herein and present their special demurrers to the complaint herein; whereupon said case was continued until 9:30 a. m. tomorrow.

November 24th, 1909, as yet of the October Term, 1908. Hon. Fletcher M. Doan, presiding. All officers present.

Court was duly opened by the officers according to law.

[Title of Court and Cause.]

This cause having been partially tried and continued from yesterday to this time, and parties hereto being present and an-

104 nouncing ready for trial, the trial of the case proceeds as follows: Counsel for defendant having presented their special demurrer to the complaint herein, whereupon after argument of respective counsel, it is by the Court ordered that ruling be de-

ferred to a later hour. Comes now counsel for the defendant and presents general demurrer to the complaint herein, which was submitted to the Court without further argument for its consideration and decision. Comes now counsel for the plaintiff and presents their motion to strike certain matter from the defendant's amended answer herein, whereupon after argument of respective counsel said motion was submitted to the Court for its consideration and decision, whereupon it is by the Court ordered that this case be and the same is hereby continued until 2:30 o'clock p. m., this day.

Court reconvened at 2:30 o'clock p. m., all officers present.

[Title of Cause.]

This case having been continued to this time, and counsel for respective parties being present, and announcing ready for trial, the trial of the case proceeds as follows: By consent of counsel for respective parties herein, it is by the Court ordered that ruling
105 on demurrers and motions herein are deferred and the trial of the case proceeds as follows: Comes now counsel for plaintiff and introduce certain documentary evidence and recalls J. N. Gaines as witness to the stand, who was duly examined and cross-examined, and then the counsel for the defendant calls as witness James F. Duncan, who was duly sworn and examined and cross-examined; whereupon it is by the Court ordered that this case be and the same is hereby continued to 9 o'clock a. m. tomorrow.

November 25th, 1908, as yet of the October Term, 1908. Hon. Fletcher M. Doan, presiding. All officers present.

Court was duly opened by the officers, according to law.

[Title of Court and Cause.]

This cause having been partially tried and continued from yesterday to this time, and all parties hereto being present and announce ready for trial, the trial of the case proceeds as follows: Plaintiff calls as witness C. A. McDonald, who was duly sworn and examined and cross-examined; whereupon the plaintiff rests. Defendant to maintain upon his part the issues herein introduces documentary
106 evidence and calls as witnesses Wm. Herring, Walter T. Fife and Rodger T. Fenton, who were duly sworn, examined and cross-examined; whereupon it now being the hour of noon, it is by the Court ordered that this case be and the same is hereby continued until 1:30 p. m., and that the Court do now stand at recess until that hour.

Court reconvened at 1:30 p. m., all officers present.

[Title of Cause.]

This cause having been continued to this time and counsel for respective parties being present, the trial of the case proceeds as fol-

lows: The defendant calls as witnesses Walter Douglas, Thos. R. York and A. A. Hopkins, who were duly sworn, examined and cross-examined, and recalled Ben Goodrich and J. N. Gaines, who were duly examined and cross-examined; whereupon the defendant rests. Comes now plaintiff and recalled H. E. Berner in rebuttal, who was duly examined and cross-examined; whereupon the plaintiff rests. Comes now the defendant and recalled H. E. Berner in surrebuttal, who was duly examined; whereupon it is by the Court ordered that this case be and the same is hereby continued to 8:30 p. m., this day.

107 Court convened at 8:30 p. m., all officers present.

[Title of Cause.]

This cause having been continued to this hour and counsel for respective parties being present, the trial of the case proceeds as follows: Comes now counsel for plaintiff and move Court for permission to amend prayer of complaint by interlineation, whereupon said motion was by the Court granted; whereupon all parties rest. It is by the Court ordered that this case be and the same is hereby continued for extension of record and submission to the Court for its decision.

April 14th, 1909, as yet of the October Term, 1908. Hon. Fletcher Mr. Doan, presiding. All officers present.

Court was duly opened by the officers, according to law.

[Title of Cause.]

Col. H. L. Pickett, Esq., of counsel for plaintiff, and E. E. Ellinwood, Esq., of counsel for defendant herein, present in open Court.

This cause having been heretofore tried and submitted to the Court on briefs and the Court having taken the matter under
108 consideration and being now fully advised in the premises, orders that judgment be entered herein in favor of the defendant for its costs.

Comes now counsel for the plaintiff and presents motion for new trial; said motion was by the Court denied, to which the plaintiff excepts.

Plaintiff gives notice of appeal in open Court.

On motion of plaintiff it is by the Court ordered that time for filing transcript of evidence be extended to October 1st, 1909.

In the District Court of the Second Judicial District of the Territory of Arizona, in and for Chochise County.

THE TERRITORY OF ARIZONA, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant.

109 *Notice of the Filing of the Reporter's Notes as and for the Statement of Facts and Bill of Exceptions.*

To Mr. E. E. Ellinwood, Attorney for the Copper Queen Consolidated Mining Co., the Defendant in the Above Entitled Action, Bisbee, Arizona:

SIR: Please take notice that the undersigned attorneys for the plaintiff in the above entitled action, have on this the 27th day of September, A. D. 1909, filed with Geo. B. Wilcox, the Clerk of the above entitled Court, the Transcript of the Reporter's Notes in the above entitled case, which we intend to adopt as the Statement of Facts and Bill of Exceptions on Appeal therein. We do this in pursuance of the provisions of Sections 2 and 3 et seq. of Act No. 74 of the Legislative Assembly of Arizona, 1907, page 125, Laws of 1907.

Kindly acknowledge the receipt of this notice.

Very respectfully,

W. G. GILMORE, *Tax Attorney.*
PICKETT & BOWMAN, *of Counsel:*
E. S. CLARK,
Attorneys for the Plaintiff.

Filed Sept. 30, 1909.

110 TERRITORY OF ARIZONA,
County of Cochise, ss:

I, Geo. B. Wilcox, Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, do hereby certify that the foregoing is a full, true and correct copy of all orders made in the case entitled Territory of Arizona, at the relation and to the use of J. N. Gaines, Tax Collector, in and for the County of Cochise, in the Territory of Arizona, vs. Copper Queen Consolidated Mining Company, a corporation, Reg. No. 5164 of Record in Minute Book No. 15 of the records of the above entitled Court, on file in the office of the Clerk of the above entitled Court.

Witness my hand and the seal of said Court this 25th day of October, A. D. 1909.

[SEAL.]

GEO. B. WILCOX,
Clerk of the District Court.
By W. E. BOGGS, *Deputy.*

In the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise.

5164.

111 THE TERRITORY OF ARIZONA, at the Relation and to the Use of J. N. Gaines, Tax Collector, in and for the County of Cochise, in the Territory of Arizona,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation.

Statement of Facts and Bill of Exceptions.

Reporter's Transcript of Evidence.

Trial in the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, before his Honor, Fletcher M. Doan, Judge, sitting without a jury, at the court house in the City of Tombstone, in said County and Territory, on the 23rd, 24th and 25th days of November, A. D. 1908.

Appearances:

For the Plaintiff: Hon. E. S. Clark, Messrs. Pickett & Bowman, W. G. Gilmore.

For the Defendant: Messrs. Herring, Sorin & Ellinwood, Hon. Frederick N. Judson.

112 Amended and corrected and refiled by W. G. Gilmore, Tax Attorney, Pickett & Bowman, special counsel, October 18, '09.

GEO. B. WILCOX, *Clerk*,
By W. E. BOGGS, *Deputy*.

Filed Sept. 27, 1909. Geo. B. Wilcox, Clerk.

TOMBSTONE, ARIZONA,
MONDAY, *November* 23, 1908.

In support of their plea and abatement, the defendants offered and introduced the following evidence, to-wit:

Mr. CLARKE: We will enter into a general understand- that an exception is entered to all rulings of the Court.

Mr. ELLINGWOOD: The statute of 1907 provides that all rulings are excepted to, whether they are claimed at the time or not.

The COURT: In the hearing of this case, all the rulings may have an exception noted.

Mr. ELLINGWOOD: Now, Mr. Attorney General, will we
113 stipulate as we did before, not as to the legal effect, or what the Complaint in the other suit was, but that such a suit, naming it, and its number, was pending at that time?

Mr. CLARK: Yes.

Mr. ELLINWOOD: It is stipulated and agreed between the parties

to this suit that on the 17th day of June, 1904, a suit was pending in this Court between the defendants in this suit as plaintiff and the County of Cochise and M. D. Scribner, Tax Collector, were defendants, of which a copy of the Amended Complaint is admitted in evidence, and marked "Defendants' Exhibit 1," and Judgment is offered and admitted in evidence as Defendants' Exhibit "2," and said case is 2239 of this Court, and numbered 787 in the Supreme Court of the Territory, and it was the same suit and same action that the Plea in Abatement in the Supreme Court of the Territory of Arizona——

Mr. CLARKE: When do you want to say that that suit was pending in this Court?

Mr. ELLINWOOD: On the 7th and 8th of June, 1904.

Mr. CLARKE: No, I won't stipulate all that you have read there. With these qualifications, that the suit was disposed of on the 7th day of June, 1904.

Mr. ELLINWOOD: The subject matter of that suit was disposed of by the Board of Supervisors. The suit itself was not dis-
114 missed until a subsequent date.

Mr. CLARKE: Put in your proof.

Mr. ELLINWOOD: I don't suppose that the counsel will want to admit that the matter was disposed of by the Board of Supervisors?

Mr. CLARKE: I say that the suit was dismissed.

Mr. ELLINWOOD: So may we stipulate then, Mr. Clarke, down to the point where the subject matter of the suit was disposed of by the Board of Supervisors, and the suit was dismissed on the 8th of June, 1904, or shall I put it in?

Mr. CLARKE: It was disposed of on the 7th day of June, but I don't care to stipulate how it was disposed of.

Mr. ELLINWOOD: I offer in evidence the Amended Complaint in action No. 2239 of this Court.

Mr. CLARK: That is the case against Scribner?

Mr. ELLINWOOD: Yes.

Mr. CLARK: That is all right.

The COURT: That is the one that was offered before, and was not marked?

Mr. ELLINWOOD: We will have it marked now, so that the stenographer can enter it in the records when the time comes. We will both want to use this record more or less.

115 Mr. CLARK: We shall desire to have our objection to all of this as noted, on the ground it is irrelevant, immaterial and incompetent.

The COURT: Objection overruled.

Said paper was marked "Exhibit 1," and is in the words and figures following, to-wit:

Exhibit 1.

In the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise.

Copper Queen Consolidated Mining Company, Plaintiff,
vs.
The County of Cochise and M. D. Scribner, County Treasurer and ex-Officio Tax Collector, Defendants.

Plaintiff's Amended Complaint.

Now comes the plaintiff, and files his amended complaint and alleges as follows:

That the plaintiff is a corporation organized under the laws of the State of New York, and is engaged in the business of mining
116 in the County of Cochise, Territory of Arizona, and has its principal place of business at Bisbee in said county.

That the defendant, the County of Cochise, is a regularly organized County of the Territory of Arizona, and the defendant M. D. Scribner, is the Treasurer and Ex-Officio Tax Collector of said County, and resides at Tombstone in said County.

That prior to the first Monday of June, A. D. 1901, the County Assessor of Cochise County, duly listed all the property of the Copper Queen Consolidated Mining Company, the plaintiff herein, owned by said company in the County of Cochise aforesaid, on the first Monday of February, 1901, and assessed the same at sums aggregating the sum of three hundred and sixty-eight thousand one hundred and thirty-nine dollars and seventy-six cents ($368,139.76.)

That said list included, among other things, the following items assessed at the following amounts, that is to say:

65 patented mining claims, viz.: Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, (Dividend-Wedge, Ellie Coon), East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mam-
117 moth, Malvina, New York, Neptune, North Star, Ophir, Ricker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunrise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle Isle, Columvia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars & Stripes, South View, Tack, Union and Virginia.

636 acres land, value		$3,180.00
Improvements, value	55,431.76	$58,611.76
Hoisting works, pumping and other machinery at mines		$44,641.00
Merchandise of any and all kinds:		
Naco	$13,875.00	
Bisbee	76,480.00	
		$90,355.00
Surveyors' instruments, value		$125.00
Work horses, number 20, value $20		400.00
Assaying outfit, value		100.00

That said assessor duly completed his tax list and assessment roll, and attached his certificate thereto, and delivered the same with the original list of the property given to him to the Clerk of the Board of Supervisors, and the same was filed in the office of the said Clerk on, to-wit: July 2, 1901, in the manner and at the time provided by law, and the said clerk thereupon performed the duties
118 required of him by law in relation to said assessment work.

That the Board of Supervisors of said County of Cochise met as a Board of Equalization on the first day of July, 1901, and thereafter on July 11, 1901, among other things, passed the following resolution:

"Office of the Board of Equalization of Cohise County, Arizona.

TOMBSTONE, *July 11th*, 1901.

In the Matter of the Equalization of the Assessment of the Property of the Copper Queen Consolidated Mining Company.

The Board, finding it necessary to add to the assessed valuation of property on the assessment roll for the year 1901, and it being proposed to increase and add to the valuation of the property on said roll, assessed to the Copper Queen Consolidated Mining Company; therefore it is ordered that the Clerk of the Board give notice to the said company in writing that the Board of Equalization will act in the case of the equalization of the assessment of the property belonging to said company, and said matter will be heard before the said Board at its office in the Court house of said County in the City of Tombstone, on the 17th day of July, 1901, at the hour of 10 o'clock in the forenoon of that day when and where the said company and all persons interested will be heard.

119 It is proposed that the following sums be added to the valuations of the following mentioned property belonging to said company as the same appears on the said assessment roll of said county for the said year 1901, to-wit:

On the Silver Spray Mine	$1,000,000.00
On the hoisting works and improvements on said mine	75,000.00
On Holbrook mine	1,000,000.00
On hoist and improvements thereon	25,000.00
On Copper Queen Mine	50,000.00
On Copper Jack Mine	50,000.00
On Building and other improvements	100,000.00
On Baxter	250,000.00
On Atlanta	250,000.00
On Dividend	350,000.00
On Rucker	200,000.00
On the stock of merchandise in Copper Queen store and warehouses	323,520.00
On surveyors' instruments	375.00
On assaying outfit	900.00
On horses	400.00
Or a total raise of	$3,975,195.00"

And thereafter the following notice was duly served upon Walter Douglas, Superintendent of the Copper Queen Consolidated Mining Company, the plaintiff herein, that is to say:

120 "To the Copper Queen Consolidated Mining Company:

Take notice that the Board of Equalization of Cochise County, Arizona, will on July 17th, 1910, at the hour of ten o'clock in the forenoon of that day take up the matter of the equalization of the assessment of your property, situated in said county, and subject to taxation at its office in the court house of said county, when and where you and all others interested may be heard.

This notice is given you in accordance with a resolution of said Board this day adopted and a copy of which is herewith served upon you.

Dated July 11th, 1901.

[SEAL.] (Signed) JAMES F. DUNCAN, *Clerk.*"

That afterwards, to-wit: On July 17, 1901, said Board of Equalization met pursuant to adjournment, and the following proceedings among others, were had and entered upon the minutes of the Board:

"In the Matter of the Equalization of the Assessment of the Properties Belonging to the Copper Queen Consolidated Mining Company.

This matter coming on this day regularly to be heard before the Board of Equalization pursuant to a notice heretofore served upon said company in writing, and which notice appears in the
121 minutes of said Board, and in which said notice it is proposed to change and correct the valuations of said company's property as the same appears upon the said assessment roll, by adding

thereto the sum of $3,464,895.00 for the reason that the sum fixed in said assessment roll appeared to be too small, and this being the day and hour fixed in said notice for the hearing, and pursuant to the notice so given Walter Douglas, Superintendent and Agent of said Co. appeared before the Board on behalf of the said company, and made statements regarding said valuation, and his argument in reference thereto, and the Board being now fully advised in the premises finds it necessary to add to the assessed valuation of the property of said company on the assessment roll as follows, to-wit:

Silver Spray Mine	$1,000,000.00
Hoisting works and Imps. on said mine	50,000.00
Holbrook Mine	1,000,000.00
Hoist & Imps. thereon	10,000.00
Copper Queen Mine	50,000.00
Copper Jack Mine	50,000.00
On building and other imps.	50,000.00
On Baxter Mine	250,000.00
On Atlanta Mine	250,000.00
On Dividend Mine	350,000.00
On Rucker Mine	200,000.00
122 Stock of mdse. in C. Q. store & warehouses	203,520.00
Surveyors' instruments	375.00
Horses	400.00
Assaying outfit	600.00
Or a total raise of	$3,464,895.00

The Clerk is instructed to notify said Co. in writing of the action of the Board."

And further complaining the plaintiff alleges that on July 12, 1901, said Board of Equalization passed the following resolution, that is to say:

"Office of the Board of Equalization of Cochise County, Arizona.

TOMBSTONE, *July* 12, 1901.

In the Matter of the Equalization of the Assessment of the Property of the Lowell & Arizona Copper Smelting and Mining Company.

The Board finding it necessary to add to the assessed valuation of the property on the assessment roll for the year 1901, and it being proposed to increase and add to the valuation of the property on said roll assessed to the Lowell & Arizona Copper Smelting and Mining Company therefore, it is ordered that the Clerk of the
123 Board give notice in writing to the said Company, and said matter will be heard before the said Board at its office in

the court house of said county in the City of Tombstone on the 20th day of July, 1901, at the hour of ten o'clock in the forenoon of that day, when and where the said company and all persons interested *in* will be heard.

The Board finding that the following mentioned properties belonging to the said Lowell & Arizona Copper Smelting and Mining Company do not appear on said assessment roll, and that the same have not been assessed, and the assessor having been required to enter the said properties upon said assessment roll, and said assessor having entered said properties as required, has fixed the valuation of said properties as follows, to-wit:

Galena	$33,500.00
Lowell	33,500.00
Bustan	33,500.00
Hanchett	33,500.00
Dallas	33,500.00
Danville	33,500.00
Delevan	33,500.00
Delmar	33,500.00
Minnesota	33,500.00
Auburn	33,500.00
Des Moines	33,500.00
Des Plan	33,500.00
Harrison	33,500.00
Helen	33,500.00
124	$469,000.00

A total assessment on properties required to be entered by assessor as aforesaid as above.

By order of the Board this July 12th, 1901.

[SEAL.] (Signed) THOS. R. YORK, *Chairman.*
(Signed) JAMES F. DUNCAN, *Clerk.*"

And thereafter the following notice was duly served upon Walter Douglas, Superintendent of the Copper Queen Consolidated Mining Company, plaintiff herein, that is to say:

"To the Lowell & Arizona Copper Smelting and Mining Company:

Take notice that the Board of Equalization of Cochise County, Arizona, will on July 20th, 1901, at the hour of ten o'clock in the forenoon of that day take up the matter of the equalization of the assessment of your property situated in said county, and subject to taxation at its office in the Court house of said county, in the City of Tombstone when and where you and all others interes*y*ed may be heard.

This notice is given you in accordance with a resolution of
125 said Board this day adopted, and a copy of which is herewith served upon you.

Dated July 12th, 1901.

[SEAL.] (Signed) JAMES F. DUNCAN, *Clerk*."

And plaintiff further alleges that on said July 12, 1901, and for some time prior thereto the plaintiff was the real owner of the property so assessed against the Lowell & Arizona Copper Smelting and Mining Company, and that in reply to the notice aforesaid Walter Douglas, the Superintendent of the plaintiff appeared before the said Board of Equalization, and on July 17, 1901, the following proceedings were had and entered July 20, 1901, in the minutes of the Board:

"In the Matter of the Equalization of the Assessment of the Property Belonging to The Lowell & Arizona Copper Smelting and Mining Company.

This matter coming on this day regularly to be heard before the Board of Equalization, pursuant to a notice heretofore served upon said Co. in writing, and in which said notice it was proposed to change and correct the valuation of said company's property as the same appeared upon said assessment roll, by adding thereto the sum of $54,000.00 for the reason that the sum fixed in said assessment roll appeared to be too small:

126 And this being the day and hour fixed in said notice for the hearing, and pursuant to the notice so given Walter Douglas, Superintendent and Agent of the Copper Queen Consolidated Mining Company appeared on the 17th day of July, and permission being granted on condition that he waive his right to appear on July 20th, the time set for the hearing in the matter of the said Lowell & Arizona Copper Smelting and Mining Company, and the said Walter Douglas, Superintendent and Agent appeared on behalf of the Copper Queen Consolidated Mining Company, and entered his protest on behalf of said company to the proposed raise on the property of the Lowell & Arizona Copper Smelting and Mining Company, and the Board being now fully advised in the premises, and the assessor having added to the assessment roll under instructions by the Board of Equalization, certain properties as it appears upon the assessment roll.

Now on motion of Supervisor Geo. D. Reay, seconded by Supervisors P. J. Delehanty, it is now unanimously ordered that the property so added of the said Lowell & Arizona Copper Smelting and Mining Company be listed on the assessment roll for tax purposes for the present year at the following valuations, which the Board finds to be the actual cash value thereof, that is to say:

127	Galena Mine	$30,000.00
	Lowell Mine	13,000.00
	Bustan Mine	1,000.00
	Hanchett Mine	1,000.00
	Dallas Mine	1,000.00
	Danville Mine	1,000.00
	Delevan Mine	1,000.00
	Delemar Mine	1,000.00
	Minnesota Mine	1,000.00
	Auburn Mine	1,000.00
	Des Moines Mine	1,000.00
	Des Plan Mine	1,000.00
	Harrison Mine	1,000.00
	Helen Mine	1,000.00
	Or a total raise of	$54,000.00

The Clerk is instructed to notify said company in writing of the action of the Board. At 5 p. m. Board stands adjourned to 7 p. m."

And the plaintiff further alleges that the properties described in the resolutions of the Board of Equalization above set forth as "Mines" are patented mining claims, and as such exempt from taxation under the laws of this territory; that for many years last past it has been the custom in the County of Cochise, notwithstanding the statute in such cases made and provided, to list all such patented mining claims as land, and to assess the same at the uniform
128 valuation of five dollars per acre; that the plaintiff has acquiesced in this practice and has at all times returned all its said patented mining claims at such valuation of five dollars per acre, and in its statement of property real and personal returned to the assessor in the year 1901, the plaintiff included patented mining claims containing 636 acres at such valuation of five dollars per acre; that the assessment roll of Cochise County for the year 1901 includes 322 such patented mining claims, which are assessed at a total valuation of $3,676,831.00, and that this assessment includes eight patented mining claims owned by this plaintiff, which are assessed at a little over $3,150,000.00, and fifteen claims late the property of the Lowell & Arizona Copper Smelting and Mining Company, which are assessed at $54,000.00; that the Board of Equalization in the month of July aforesaid well knew that a large number of the 322 patented mining claims aforesaid were of a great value, and had yielded large returns during the preceding year, and that said Board fraudulently and unlawfully and for the purpose of placing an unfair and undue burden upon this plaintiff raised the valuation of the patented mining claims of this plaintiff to the exclusion of other like property in the county; that the said Board of Equalization made no investigation into and heard no evidence whatever concerning the cash value of the patented mining claims,

and other property of the plaintiff, the valuation of which
129 the Board raised and added to, and that said Board made no determination or finding that the assessed value of said property or any part thereof as returned by the assessor as aforesaid was too small, and that the Board, in fact, made no valuation whatever of said property or any part thereof, but acted in the premises arbitrarily, and with the intent to wrong, defraud and oppress the plaintiff, and to discriminate against the plaintiff.

And plaintiff further alleges upon information and belief that the valuation placed by the Board of Equalization upon the patented mines of the plaintiff as aforesaid is, according to any just known method of arriving at the full cash value of such property, grossly excessive, and that said Board of Equalization acted in the premises capriciously, and in total disregard *to* the provisions of the statute under which it professed to act, and with the avowed purpose of forcing the plaintiff to pay more than its just share of the taxes of said year 1901.

And further complaining the plaintiff alleges that on and before the third Monday in June, A. D. 1901, the assessor of said County of Cochise well knew that there were several thousand unpatented mining claims in said county of great value, the owners whereof had failed or neglected to make out and deliver to him a list thereof as required by law, yet the said assessor wholly disregarding his
130 duty in that behalf wholly failed and neglected to include any of said mining claims on the tax list or assessment roll certified and delivered by him to the Clerk of the Board of Supervisors of said County on or before the third Monday of June, A. D. 1901; and that the Board of Equalization aforesaid at their session in the month of July, A. D. 1901, and at the time of their acts herein complained of, had notice and well knew that there were several thousands of unpatented mining claims in said County of Cochise of great value, and that the assessor of the county had wholly failed and neglected as aforesaid to list and assess any of said unpatented claims, yet the said Board of Equalization wholly failed and neglected to require the said assessor to enter upon the assessment roll the said unpatented claims or any of them, and unlawfully, arbitrarily and without right assumed and attempted to assess only patented mining claims in said county, and wholly failed, neglected and refused to assess any other kind of mining claims in said county by reason whereof the whole burden of taxation upon the class of property known as "Mining claims" in said county was and is laid unjustly upon said patented mining claims, and unpatented mining claims are left free from any taxation whatever.

And further complaining, the plaintiff alleges that the arbitrary, capricious and unlawful acts of the said Board of Equaliza-
131 tion herein complained of, were taken by said Board without any agreement or understanding with the Board of Equalization of the other counties of the territory, and as a result thereof an undue burden of taxation for territorial purposes has been laid upon the county of Cochise, and the tax-payers thereof, and

especially upon this plaintiff and the plaintiff is required to pay a tax for territorial purposes in excess of one-half the tax laid upon the class of property known as "Patented Mining Claims or Mines" in the territory, although as plaintiff is informed and believes the value of the patented mining claims of the plaintiff does not exceed a twentieth part of the value of property of the same class in this territory.

And further complaining, plaintiff alleges that the sum of $44,641.00 at which sum the hoisting works, pumping and other machinery at mines belonging to the plaintiff was assessed by the assessor is the full cash value of said property, including the hoisting works and improvements upon the Silver Spray and Holbrook Mines, yet the said Board of Equalization without any inquiry in the matter, and without any evidence before them except the sworn return of the company, and the statement of Walter Douglas, Superintendent as aforesaid, made at the meeting of the Board on July 17th aforesaid, wilfully, fraudulently and in order further to carry out its unlawful designs to force the plaintiff to pay an un-
132 equal and unfair portion of the taxes of the county for the year 1901, arbitrarily raised the assessment of the hoisting works and improvements upon the Silver Spray Mine fifty thousand dollars, and upon the Holbrook mine ten thousand dollars.

And plaintiff further alleges that in equalizing the taxes upon the merchandise for the year 1901 the Board of Equalization, as plaintiff is informed and believes, adopted the general rule of assessing such property at seventy-five per cent of the invoice price, but notwithstanding the fact that Walter Douglas, Superintendent as aforesaid informed the Board that the invoice price of all merchandise of any and all kinds owned by the plaintiff at its store, and at Naco in said county of Cochise on the first Monday of February, 1901, was about $220,000.00, and offered to produce satisfactory proof of such fact to the Board, the said Board of Equalization assessed the plaintiff for such merchandise the full sum of $293,875.00.

And the plaintiff admits here that in order to equalize the assessment of merchandise belonging to the plaintiff according to the general rule aforesaid, adopted by the Board of Equalization in the case of such property, there should be added to the valuation of its property as returned by the assessor the sum of $73,500, making the total valuation of the property of the company for the year
133 1901 the sum of $441,659.76, and the plaintiff alleges that before the filing of this complaint, it tendered to the Treasurer and Ex-Officio Tax Collector of Cochise County aforesaid, the full sum of $14,133.12, being the taxes due by the plaintiff upon its property aforesaid for the year 1901 at the rate of $3.20 per hundred, the rate fixed by the Supervisors of said County of Cochise for the year 1901, but the said Treasurer and Ex-Officio Tax Collector refused to accept the same; and the plaintiff now brings the said sum of $14,133.12 so tendered into Court here, ready to be paid to said Treasurer and Ex-Officio Tax Collector at any time if he will accept the same.

And plaintiff alleges that if said acts and proceedings of said

Board of Equalization herein complained of are permitted to be carried into effect, plaintiff will be required to pay more than its just share of the taxes for said year 1901 to the great and irreparable damage of the plaintiff.

Wherefore, the plaintiff prays that the defendants herein, the County of Cochise and M. D. Scribner, Treasurer and Ex-Officio Tax Collector, and each of them be enjoined and restrained from collecting or attempting to collect from the plaintiff for taxes for the year 1901 any sum in excess of the sum of $14,133.12, and that
134 the plaintiff may have such other and further relief in the premises as the circumstances of this case may require, and to the Court shall seem meet.

HERRING & MITCHELL,
Attorneys for Plaintiff.

TERRITORY OF ARIZONA,
County of Cochise, ss:

Walter Douglas, of lawful age, being duly sworn according to law makes oath and says that he is Supeprintendent of the Copper Queen Consolidated Mining Company, the plaintiff herein; that he has read the foregoing complaint, and knows the contents thereof, and the same is true of his own knowledge, except the matters therein stated on information and belief, and that as to those matters he believes it to be true.

WALTER DOUGLAS.

Subscribed and sworn to before me this 3d day of December, A. D. 1901.

[SEAL.] A. H. EMANUEL, *Clerk.*

Mr. ELLINWOOD: Now, I offer the findings of fact in No. 2239.
Mr. CLARK: That is the same case?
Mr. ELLINWOOD: Same case.
Mr. CLARK: Same objection.
The COURT: Same ruling.

135 Said paper was marked "Exhibit 2," and is in the words and figures following, to-wit:

"EXHIBIT 2.

In the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise.

COPPER QUEEN CONSOLIDATED MINING COMPANY, Plaintiff,
vs.
THE COUNTY OF COCHISE AND M. D. SCRIBNER, County Treasurer and ex-Officio Tax Collector, Defendants.

Findings.

This case having been heretofore submitted to the Court for decision upon the pleadings, the evidence, and the argument of the

counsel for the respective parties, and the Court having duly considered thereof, and being now fully advised in the premises, makes the following findings:

I.

That the action of the Board of Equalization of Cochise
136 County on July 17, 1901, complained of in this complaint, so far as procedure is concerned, was regular in form, and taken after due notice to the plaintiff, Copper Queen Consolidated Mining Company.

II.

That the action of said Board of Equalization at their said meeting of July 17, 1901, whereby the assessed valuation of the following property of the company plaintiff on the assessment roll was raised as follows, to-wit:

Silver Spray Mine	$1,000,000.00
Holbrook Mine	1,000,000.00
Hoist & Imps. thereon	10,000.00
Copper Queen Mine	50,000.00
Copper Jack Mine	50,000.00
On Baxter Mine	250,000.00
On Atlanta Mine	250,000.00
On Dividend Mine	350,000.00
On Rucker Mine	200,000.00
	$3,160,000.00

was not based upon any information or evidence had or obtained by them, but was taken arbitrarily and capriciously, and for the purpose of imposing upon the plaintiff an unjust share of the burden of taxation.

137 III.

That the action of said Board of Equalization at their said meeting of July 17, 1901, whereby the assessed valuation of the following property of the company plaintiff on the assessment roll was raised as follows, viz.:

Hoisting works & Imps. on Silver Spray Mine	$50,000.00
On buildings and other Imps.	50,000.00
Stock of Mdse. in C. Q. store and warehouses	203,520.00
Surveyors' instruments	375.00
Horses	400.00
Assaying outfit	600.00
Lowell Group of Mines	54,000.00
	$358,895.00

was based upon information and evidence, and was a bona fide decision of the questions before them for consideration.

IV.

That the plaintiff has paid to the County Treasurer of said Cochise County, the sum of $14,133.12, being the amount conceded by it to be due for taxes for the year 1901, and that said payment includes the taxes upon $73,500, part and parcel of
138 the raise made by the Board of Equalization upon the merchandise belonging to the plaintiff as above found.

V.

That the valuation of the plaintiff's property on the assessment roll for the year 1901, was properly raised in the sum of $358,895, and that after deducting the $73,500, admitted by the plaintiff in its complaint, and upon which the taxes have been paid as aforesaid, the plaintiff is justly chargeable with taxes, over and above what they have already paid, upon the sum of $285,395, at the rate of $3.20 per hundred, to-wit: The sum of $9,132.64 together with a penalty thereon of 5 per cent as delinquent taxes, making in all the sum of $9,589.27.

Conclusions of Law.

I.

That the action of the Board of Equalization in raising the valuation of the property of the plaintiff mentioned in the foregoing second finding of fact, was under the facts found, fraudulent and wholly void as against the plaintiff.

II.

That the Court is without power or jurisdiction under the facts found, to review the action of said Board of Equalization
139 in raising the valuation of the property of the plaintiff mentioned in the third finding of fact.

III.

That plaintiff is entitled to a perpetual injunction as in the complaint prayed for, upon its paying to the County Treasurer of said Cochise County in full for its taxes for the year 1901 the sum of $9,589.27.

And a decree is hereby ordered accordingly.
Dated December 23rd, 1901.

GEO. R. DAVIS, *Judge.*"

Mr. ELLINWOOD: And the decree.

Said Decree was marked "Exhibit 3," and was introduced in evidence, and is in the words and figures following, to-wit:

EXHIBIT 3.

"In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

140 COPPER QUEEN CONSOLIDATED MINING COMPANY,
Plaintiff,
vs.
THE COUNTY OF COCHISE and M. D. SCRIBNER, County Treasurer and ex-Officio Tax Collector, Defendants.

Decree.

This case having been heretofore regularly tried before the Court, and submitted to the Court for decision upon the pleadings, the evidence and the argument of counsel, and the Court having this day rendered its decision thereof in writing and having ordered a decree for the plaintiff,

Now, therefore, on motion of Messrs. Herring & Mitchell, attorneys for the plaintiff, it is ordered, considered and adjudged by the Court that the defendants, the County of Cochise and M. D. Scribner, Treasurer and Ex-Officio Tax Collector, and each of them, their and each of their attorneys, agents and employés, be, and they hereby are perpetually enjoined and restrained from collecting or in any manner attempting to collect from the plaintiff, the Copper Queen Consolidated Mining Company, for taxes for the year 1901, any sum in excess of nine thousand, one hundred and thirty-two dollars and sixty-four cents ($9,132.64) being the taxes
141 lawfully assessed against the following described property, in addition to what had already been paid, viz.:

Hoisting works and improvements on Silver Spray Mine		$50,000.00
Buildings and other improvements		50,000.00
Stock of merchandise in Copper Queen store and warehouses	$203,520.00	
Less amount admitted in complaint	73,500.00	130,020.00
Surveyors' instruments		375.00
Horses		400.00
Assaying outfit		600.00
Lowell Group of mines		54,000.00
Total		$285,395.00

together with the penalty thereon of 5 per cent as delinquent taxes, making in all the sum of nine thousand, five hundred and eighty-nine dollars, and twenty-seven cents ($9,589.27), and that a writ of injunction issue out of the Clerk's office and under the seal of this Court, perpetually enjoining and restraining the said defendants, the County of Cochise and M. D. Scribner, Treasurer and Ex-

Officio Tax Collector, their and each of their attorneys, agents and employés as herein ordered.

142 And it is further ordered, considered, and adjudged by the Court that the plaintiff, Copper Queen Consolidated Mining Company, do have and recover of and from the defendant, the County of Cochise, its costs herein taxed at three hundred and fifty-one 83-100 dollars.

Dated this 23rd day of December, A. D. 1901.

By the Court,

GEO. R. DAVIS, *Judge*."

Mr. ELLINWOOD: And the Writ of Injunction, was the one that was introduced before.

Said Writ of Injunction was marked "Exhibit 4," and was introduced in evidence, and is in the words and figures, following, to-wit:

EXHIBIT 4.

"In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

143 COPPER QUEEN CONSOLIDATED MINING COMPANY, Plaintiff,

vs.

THE COUNTY OF COCHISE and M. D. SCRIBNER, County Treasurer and ex-Officio Tax Collector, Defendants.

In the name of the Territory of Arizona.

The Territory of Arizona to the County of Cochise and M. D. Scribner, County Treasurer and ex-Officio Tax Collector, Greeting:

Whereas, by the final decree of the Court in this case made and entered on the 23rd day of December, A. D. 1901, you and each of you, your and each of your attorneys, agents and employés, are perpetually enjoined and restrained as in said decree and in this writ is hereinafter more particularly mentioned:

We therefore command you that you and each of you, your and each of your attorneys, agents and employés, wholly desist from collecting or in any manner attempting to collect from the plaintiff, Copper Queen Consolidated Mining Company, for taxes for the year 1901, any sum in excess of nine thousand, one hundred and thirty-two dollars and sixty-four cents ($9,132.64), being

144 the taxes lawfully assessed against the following described property in addition to what has already been paid, viz.:

Hoisting works and improvements on Silver Spray Mine		$50,000.00
Buildings and other improvements		50,000.00
Stock of merchandise in Copper Queen store and warehouse	$203,520.00	
Less amount admitted in complaint	73,500.00	130,020.00
Surveyors' instruments		375.00
Horses		400.00
Assaying outfit		600.00
Lowell Group of Mines		54,000.00
Total		$285,395.00

together with the penalty thereon of 5 per cent as delinquent taxes, making in all the sum of nine thousand, five hundred and eighty-nine dollars, and twenty-seven cents ($9,589.27).

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, this 25th day of January, A. D. 1902.

[SEAL.] A. H. EMANUEL, *Clerk.*

145 Attached to said paper as a part thereof was the following:

"I hereby certify that I received the within writ on the 25th day of January, 1902, at the hour of 7 o'clock p. m., and personally served the same on the 25th day of January, 1902, on the County of Cochise and M. D. Scribner, County Treasurer and Ex-Officio Tax Collector, being the defendants named in said writ, by delivering to Thomas R. York, Chairman of the Board of Supervisors, and M. D. Scribner, County Treasurer and Ex-Officio Tax Collector, in the City of Tombstone and County of Cochise, a true and correct copy of said writ.

Dated this 25th day of January, 1902.

A. V. LEWIS, *Sheriff,*
By P. McDONALD,
Deputy Sheriff."

Mr. ELLINWOOD: A certificate of the Clerk of this District Court as to the dismissal of the action, and in that case I would like to have a minute entry of the Clerk. We will put in the record.

Mr. CLARK: We will consider it in, subject to the objection.

The COURT: Same ruling.

Said paper was marked "Exhibit 5" and was introduced in evidence, and the same is in the words and figures following, to-wit:

146 EXHIBIT 5.

June 25th, 1904. June Term, 1904.

FRIDAY, *June 25th*, 1904.

The District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise, convened pursuant to adjournment of June 24th, 1904, at 9 o'clock a. m.

Present:

Hon. Fletcher M. Doan, Judge.
D. L. Cunningham, District Attorney.
A. D. Lewis, Sheriff.
Geo. B. Wilcox, Clerk.
C. I. McReynolds, Reporter.

Court was duly opened according to law, all officers being present.

2239.

COPPER QUEEN MIN'G CO.
vs.
COUNTY OF COCHISE.

Comes now William Herring, Esq., attorney for the plaintiff herein, and upon his motion it is by the Court ordered that this case be, and the same is hereby dismissed.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, Geo. B. Wilcox, Clerk of the District Court of the Second Judicial District of the Territory of Arizona, in and for the
147 County of Cochise, do certify the above to be a full, true, complete and correct copy of the order of said Court made and entered in the above *n*titled cause, as the same appears of record upon the minutes of said Court.

Given under my hand and the seal of said Court affixed hereto, this, the 7th day of May, 1908.

[SEAL.] GEO. B. WILCOX, *Clerk.*
By PEDRO MICHELENA,
Deputy Clerk.

Mr. ELLINWOOD: Now, I offer in evidence a resolution of the Board of Supervisors, passed on the 7th day of July, 1904, purporting to compromise this action.

Mr. CLARK: Now, if Your Honor pleases, the resolution that was passed or adopted by the Board of Supervisors on June 7th, 1904, reads as follows: "In the Matter of the settlement of the suit now pending in the District Court of the First Judicial District (now Second Judicial District), of the Territory of Arizona, in and for the County of Cochise, wherein the Copper Queen Consolidated Mining Company is plaintiff, and the County of Cochise and M. D. Scribner, County Treasurer and Ex-Officio Tax Collector are defendants, the Board of Supervisors of Cochise County hereby adopt the following resolution, to-wit:

148 Resolved: That upon condition and in consideration that said plaintiff in said cause shall dismiss said cause in said Court, and pay to the said County of Cochise the sum of five thousand ($5,000.00) dollars, in full satisfaction and payment of the costs and expenses incurred by the defendants in said suit, and of the

fees agreed to be paid by the Board of Supervisors of said county to its attorneys in said cause, and that said plaintiff shall further pay into the treasury of the County of Cochise the sum of six hundred and sixty-one dollars and forty-four cents ($661.44), which said sum, together with the sum already paid by said company into the treasury of said county at the valuation of five dollars ($5.00) per acre returned by said company upon sixty-five (65) Patented Mines, containing six hundred and thirty-six (636) acres in the year 1901, makes the actual basis of valuation per acre of said Patented Mines in this compromise, thirty-seven dollars and fifty cents ($37.50), thus making the total amount now to be paid by said company the sum of five thousand, six hundred and sixty-one dollars and forty-four cents ($5661.44), in addition to the sum paid by said plaintiff company for the taxes levied and assessed against it in said county for the year 1901.

It is hereby stipulated that the assessed valuation of improvements stand as decreed by the District Court at the trial of said cause, and it is further stipulated, agreed and confessed by
149 said Board of Supervisors of said County of Cochise for and in behalf of said county, that said money so paid by the Copper Queen Consolidated Mining Company, are, and forever shall be, deemed a full payment, satisfaction and acquittance of any and all sums of money due, or to grow due from said company, in any manner whatsoever, for or on account of taxes levied and assessed against said company for the year 1901, and that said company be, and the same hereby is, forever released and discharged from the payment of any other and further sum in the premises, for and on account of taxes for said year nineteen hundred and one; and said settlement being a compromise upon the terms aforesaid of said suit between the parties hereto.

The above resolution is submitted to the Board of Supervisors of Cochise County for adoption and entry upon its minutes; and upon its approval by counsel in the case for defendants, and the present District Attorney of Cochise County, and its adoption by the Board of Supervisors, the total sum specified in said resolution will be promptly paid into the County Treasury of Cochise County by the Copper Queen Consolidated Mining Company.

(Signed) WILLIAM HERRING,
Attorney for the Copper Queen Consolidated Mining Company.

150 The foregoing meets my approbation in substance and in form, if the sums mentioned are the sums agreed upon between the parties.

(Signed) ALLEN R. ENGLISH,
Counsel for Cochise County and M. D. Scribner, County Treasurer, etc., in said Cause.

I, D. L. Cunningham, District Attorney of Cochise County, approve of the form of the foregoing settlement and compromise, and the resolution in relation thereto.

(Signed) D. L. CUNNINGHAM,
Dist. Attorney of Cochise Co."

Now, in the first place, there does not appear to be any adoption of this resolution by the Board of Supervisors. The certificate is this: "I, J. N. Gaines, Clerk of the Board of Supervisors of Cochise County, Territory of Arizona, do hereby certify that the above and foregoing is a true and correct copy of the minutes of the proceedings of the Board of Supervisors of Cochise County, Arizona, of June 7th, 1904, so far as they relate to the compromise of the cause wherein the Copper Queen Consolidated Mining Company was plaintiff and the County of Cochise and M. D. Scribner, County Treasurer and Ex-Officio Tax Collector, were defendants."

151 Now, Your Honor will see at a glance, or without a glance, on its face it does not purport to be any official action taken on this resolution so called. It does not appear that it has ever been acted upon by the Clerk. The Clerk seems, for some reason or other, to have copied into the record of Cochise County a proposition, and of its face purports to have been made by counsel for the Copper Queen Consolidated Mining Company wherein that company agreed to pay the counsel fees incurred by the County of Cochise in this litigation, amounting to the sum of five thousand dollars, and pay to the County Treasurer the magnificent sum of six hundred dollars and forty cents in compromise of nearly a hundred thousand dollars in taxes due the County of Cochise. This is offered, as I say, in support of the contention of counsel that these taxes involving that vast sum of the tax payer's money of Cochise County has been compromised and settled and thrown away. On its face it is inadmissible, but even if it were not so, and even though under rules of evidence entitled to be considered by Your Honor, it shows on its very face that it is absolutely null and void as a compromise, or as an attempted compromise of these taxes, or any taxes.

It has been provided by the Legislature in Act 92 of the Laws of 1903 that the Boards of Supervisors of the various counties may compromise taxes only in three cases. First: Where the

152 property is not worth the taxes, and that is not pleaded here—not attempted to be pleaded in this so-called compromise which is set forth in the pleading. Second: Where the property will not sell for the amount of the taxes charged against them—not the amount of the assessment, but the amount of the taxes claimed by the County, and that is not referred to or set out in this so-called plea and abatement, nor in the complaint, nor anywhere, and of course Your Honor takes judicial notice of the fact that it would be impossible to set such facts and conditions. Now, if Your Honor pleases, the statute itself bars or precludes the Board of Supervisors, or any Board of Supervisors from compromising a tax matter, or tax—or a suit for taxes in any and all cases, save and except the two cases arising under the specific conditions which I have just named as set forth in Act 92 of the Laws of 1903, Section 91 of that Act.

Mr. ELLINWOOD: I think that you are going farther than we intended. We do not offer this at this time to show that there was a compromise, or that the compromise was legal or effective. It was offered to show the status of the situation. We will say this, that

if there was no compromise, and admit for the sake of argument that Mr. Clark was right, and of course, the Supreme Court has ruled upon the power of the Court to compromise this case, but at the same time this resolution was a direction to the Tax
153 Collector to stop these other tax suits at that time. Waiving the question of the power of the compromise, the only question I see is the objection Mr. Clark has made to the resolution in its form.

Mr. JUDSON: As I understand, this first plea and abatement is addressed to one question, whether under the Arizona statute the purported action by the Board of Supervisors was proper, and that being so, whatever throws light on that situation is relevant. It is wholly immaterial whether the Board offered to compromise the question. The question is, what was the situation when this suit was brought, as a matter of fact. That is all. Counsel may be perfectly right; it may be that they had no power to compromise, and if that was so, there was no dismissal based on that compromise, which would fall, but so far as this issue is concerned, it seems to me that the argument of the counsel should be reserved until we offered that and claimed it was so compromised, and in the mean time, the Court must know what the situation was at the time this action was taken.

Mr. CLARK: If Your Honor pleases, I am indebted to counsel for taking the argument out of my hands. We don't desire this instrument to be admitted for any purpose, because if it is admitted for any purpose, it is here in the case, and might as well be considered in for all purposes. It is not admissible for any purpose on its face. I am well aware of the import of the plea in abatement.
154 I know what it is, and I know what this resolution purports to be, and if it is void on its face, it is void from start to finish, all the way through, and it is not valid for any purpose. Now, I point out in addition to what I have already said in regard to this matter, this matter has been passed upon in two cases by the Supreme Court of this territory. One in the case of George N. Sherman and others against the Board of Supervisors of Yavapai County, and the relation of the Attorney General against J. N. Gaines, Tax Collector of this county to compel him to bring this very suit, and in the latter case the Court went a good deal further than it did in the first one, and it went so far as to say that a suit for taxes might not be compromised by Boards of Supervisors except under the particular conditions to which I have just alluded. Now, the section giving the Board, or attempting to give the Board power to omit any particular tract of land of any particular tax payer from a suit pending is found in Section 91 of the Act of 1903, and which reads: "Whenever it shall appear to any county board of supervisors that any tract of land or town lot contained in said 'back tax book' is not worth the amount of taxes," etc. it may be compromised and in that same suit, "and provided further, that the county board of supervisors of any county may direct that any tax or fund, the validity of which is being contested in the Courts, may be
155 omitted from any suit brought under this chapter." Now, we say, in order that there may be a compromise by the

Board, or a direction by the board that any particular tax or fund may be omitted from a suit brought under this chapter, these conditions must exist and appear of record, or one of them must exist as a condition precedent for the Board to make such an order. Now then, when the Board made this order in 1904, there was no suit pending, and there was no direction to omit this tax or fund from any suit then pending, or might thereafter be pending, because the order of the Board disposed of any suit that had been pending in that behalf, therefore there was no suit pending. In itself it disposes of that contention. Why, it says right here that there is a compromise and full payment and satisfaction in any manner whatsoever for or on account of taxes levied and assessed, and headed "in the matter of the compromise and settlement of the suit now pending." Now, assuming for the sake of argument that that order was made. There is nothing here to show that it was ever made that would have disposed and eliminated the suit pending, therefore when the order went into effect, there was no suit pending, and there could have been no direction to omit it from any subsequent suit. And I call Your Honor's attention to that the fact that all this purports to be is a certified copy of a proposition held out by the counsel for the Copper Queen Consolidated Mining Company to the Board.

156 Mr. ELLINWOOD: If the Court will read the first line of the heading and the certificate, he will see.

Mr. JUDSON: We — taken an entirely different view of the question before the Court. Now, if this was a question of what was the legal effect of the action taken by the Board at that time, that argument might be relevant, but it is a novel proposition to me that counsel would take a paper and by reading it say that plaintiff's case is defeated, and yet wants to deny the Court the privilege of reading the paper to see if he can draw the same conclusion. The whole purpose of offering this paper is for the Court to read it.

Mr. CLARK: Isn't the Court reading it?

Mr. JUDSON: If the Court can read it, and can draw from it the inference that counsel does, therefore it is proper evidence. It may have a different legal effect than what we wanted, but anything is relevant that aids the Court in determining the subject matter. The issue was that there was a suit pending that required certain action by the Board of Supervisors under the statute. Now, whatever throws light on that is admissible. There was a suit pending. Counsel says there was not. Now, that is an issue. Now, that issue must be determined by the Court from the record and from the testimony. Now, whether they undertook to make the compromise valid under the laws of Arizona is another ques-

157 tion entirely. I submit now, and present the paper so that the Court can read it, and see whether, from all the facts, there was a suit pending which required certain action.

Mr. CLARK: Is it counsel's position that there was an order made on that day dismissing the action?

Mr. JUDSON: I say, for what it is worth, I say that the record shows this: That the Board did take certain action, and received

certain money, and by reason of that the plaintiff dismissed, the company dismissed its suit, but the single *quether* is now whether certain action was taken by the Board. We will never get through this case if we keep on arguing the whole case on every paper. The question is now, what was done at that time, and that is all there is to it, and not the legal effect.

Mr. CLARK: But the question is, as you stated in your plea in abatement, the contention is that the Board of Supervisors directed that his be omitted, if I understand you correctly.

Mr. JUDSON: Yes, but we can't determine that until we offer our evidence.

Mr. CLARK: I say, you are not a party in this plea in abatement.

Mr. JUDSON: Not at all.

158 Mr. CLARK: It is your position, because that suit was directed to be dismissed, and that is all there is on the face of it, and nothing more; because there was a direction dismissing that, that is your position?

Mr. JUDSON: It may be that it does not show that they had the power to do anything, but no matter, we have a right to fully present that situation to the Court, exactly what was done.

Mr. CLARK: That is what I want you to state, whether your position is because the Board of Supervisors ordered a dismissal of that action, it thereby bound or directed the Treasurer and Tax Collector to omit that tax from the suit. If it is not admitted for that, it is not admitted at all.

The COURT: Now, I understand that your first plea in abatement is that the validity of this tax was being questioned in your former suit that was brought at one time in this Court?

Mr. CLARK: That is defendant's position.

The COURT: And that on or about the 7th day of June, 1904, the Board of Supervisors, in compromising *of* that suit, directed that no suit should be brought for the tax, the validity of which was in contest, and that since that order, no further order of the Board of Supervisors has been made authorizing the bringing of this suit?

Mr. ELLINWOOD: That is our position.

159 The COURT: And they are offering the paper that has been discussed as part of the evidence tending to show either the existence of the suit referred to, or the order of the Board in reference to any other suit for the tax, the validity of which was in contest in that suit?

Mr. CLARK: Well, I presume that is counsel's position.

Mr. JUDSON: That is our position.

The COURT: And your objection to this is, that it does not tend to establish either of those facts?

Mr. CLARK: Yes, sir, and we say that it does not show on its face that it has been adopted by the Board, and if it is, it is absolutely void.

The COURT: I think I will admit this paper. The minutes of the Board of Supervisors, I presume, are accessible. It does not occur to me that this paper, as I read it, is sufficiently definite to advise the Court as to what was done. This is certified to by the Clerk of

the Board as a copy of the minutes of the proceedings so far as they are applicable.

Mr. ELLINWOOD: The minutes of the acts of the Board.

The COURT: It shows the minutes of the Board. It is then headed "certified copy of the resolution passed by the Board" on a certain date.

150 Mr. ELLINWOOD: If the Court will permit me, I will put Mr. Gaines on the stand and supplement that.

The COURT: And then it says: "In the matter of the compromise and settlement of the suit now pending, the Board of Supervisors of Cochise County hereby adopt the following resolution, to-wit:" and then the copy "that upon the condition that the defendant" will do thus and so, and then it says "the above resolution is submitted to the Board for adoption and entry upon its minutes; and upon its approval by counsel in the case for defendants and by the present District Attorney, and its adoption by the Board of Supervisors, the defendants," signed by counsel for the company, with an approval signed by "English, counsel for the county," and approval signed by the District Attorney. It does not appear from the entry, of its presentation to the Board, or its adoption by the Board.

Mr. ELLINWOOD: Mr. Gaines, take the stand.

The COURT: It may be supplimented so as to go in.

Mr. ELLINWOOD: Yes; Mr. Gaines.

J. N. GAINES, Being called as a witness on behalf of the defendants, and having been duly sworn according to law, testified as follows:

161 Direct examination by Mr. ELLINWOOD:

Q. Your name is J. N. Gaines?
A. Yes sir.
Q. You reside in Tombstone?
A. Yes sir.
Q. Cochise County, Arizona?
A. Yes sir.
Q. Did on the 7th day of June, 1904?
A. Yes sir.
Q. What official position did you hold at that time?
A. Clerk of the Board of Supervisors.
Q. Were you present at the meeting of the Board of Supervisors on the 7th day of June, 1904?
A. Yes sir.
Q. I show you a paper marked, "Exhibit 6, for identification," I will ask you what, if anything, was done, what action was taken, if any, by the Board of Supervisors of this County upon that matter at the time?

Mr. CLARK: We object; the Board of Supervisors can speak by its record, and not otherwise.

Mr. ELLINWOOD: Yes, it can be supplemented, if the Court please.

Mr. CLARK: By the record.

Mr. JUDSON: It is not contradicting the record; it is in aid of the record.

162 Mr. CLARK: The record is here; this purports to be the record.

The COURT: I would suggest that the record of the Board of Supervisors is the best evidence.

Mr. ELLINWOOD: It is a question of time. This is an exact copy of the record, because I have examined it myself. If the record was brought up here, it would not disclose anything more than this paper discloses. It is simply that the Clerk kept on saying it was the proposed resolution, in place of entering the resolution and stopping there, and now I am asking the Clerk of the Board, as a matter of fact, what was done at that meeting, and what was said at that time.

Mr. CLARK: Clearly that cannot be done. I consider it improper for counsel to offer evidence of that character, when it can be done by the record.

Mr. JUDSON: Suppose that a public record, kept by the Clerk, through a clerical omission, fails to record the adoption of a resolution. Questions come up afterwards. The resolution was, in fact, adopted, *but* but he neglected to record it; the Board takes action upon it; pays out and received money on the action taken by the Board. Now, we submit it is simply a furtherance of justice to allow the Clerk, whose duty it was to keep the record, to testify to the fact that he failed to make the entry.

Mr. CLARK: Let me suggest, that if there be such an omis-
163 sion in the record, and the Court desires to make the record speak the truth, they may do it by proper action, and that action must be entered of record, and it can't be done or proven by any other way.

The COURT: You had better get the record.

Witness excused.

Mr. ELLINWOOD: We will call Mr. Berner with the record of June 7th, 1904.

H. E. BERNER, Being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ELLINWOOD:

Q. Your name is H. E. Berner?

A. Yes sir.

Q. You are the Clerk of the Board of Supervisors of Cochise County?

A. Yes sir.

Q. Are you the custodian of the records of the Board of Supervisors?

A. I am.

Q. Will you turn to the meeting of June 7th, 1904?

A. Yes sir.

Mr. ELLINWOOD: If the Court please, I offer in evidence the
164 record of the meeting of the Board of Supervisors of Cochise County under date of June 7th, 1904, as the same appears upon pages 513, 514, 515 and 516 of Volume 5, Minute Book 5.

Mr. CLARK: Yes, we object to it for the reasons already urged in our objection to this so-called certified copy of resolution of the Board of Supervisors of Cochise County compromising the suit, or attempting to compromise it.

The COURT: I will examine the offer and rule upon the objection.

Mr. HERRING: Before the Court rules upon that proposition, I would like to say one word in relation to it. In the first place, the Court has before it a record, a record of the Board of Supervisors. It is a record, and as a record, it is verified. Now, this resolution, this paper as a resolution, this question wants to be considered from two standpoints. One point technically as to a record, and the other from a parliamentary standpoint, the government of bodies; the action of deliberate bodies. Here is a resolution "resolved that upon condition and in consideration that said plaintiff in said cause shall dismiss said cause in said Court, and pay to the said County of Cochise the sum of five thousand dollars," etc. and then it proceeds, after the colloquium, start to say what was done. What is done? Now, we go on down. What was done was a compromise. Now, we go on
down to the last clause in the record "the above resolution is
165 submitted to the Board of Supervisors of Cochise County for adoption and entry upon its minutes." I say to this Court that if you were to take a parliamentary record—take a record of any deliberate body, you will find this language in the proposed resolution; you will find an entry of it, and adoption must necessarily proceed. The mere fact that upon that paper it does not appear in haec verba that it was adopted is only one stage of the discussion. The resolution appears where it ought to be. It appears in the records of the Board. Now, then, that is sufficient to enable us to proceed to show by subsequent action confirming the action of the Board in its adoption, and that subsequent action would be the direction of the Board, coupled with the approval of the District Attorney saying the things called for in this resolution were completed, and the record, if silent on the subject of the adoption can be supplemented. I don't think that requires any argument that we can supplement the record of a body like the Board of Supervisors, or any deliberate body.

The COURT: The minute entry—the question arises in my mind. I wanted to see what the original record of the Board shows. I don't know whether the record shows the adoption and presentation of the resolution or not. There was nothing to advise me in that paper how much was the Board and how much was the resolution.
I find on page 516 of the records of the Board, and while it
166 may be irregular from one stand point, it may possibly pass muster in another. The wording of that, it is not quite exactly as that is, and the record shows the adoption of the resolution, which does not appear, so that I would suppose that the record will show the offer of the resolution, it being voted upon and its

adoption, but instead of that this is simply an adoption by the Board of the resolution. The objection is overruled.

Mr. ELLINWOOD: The copy of the original minutes will be put in the record.

The COURT: I might suggest that a copy of the minutes would be preferable to this. This, however, is a verbatim copy, but it is drafted in such a manner that it does not so show.

Mr. ELLINWOOD: We will supply a certified copy of that entire meeting.

Said paper was marked "Exhibit 6", and was introduced in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT 6.

"Certified Copy of Minutes of the Board of Supervisors, June 7, 1904.

TOMBSTONE, ARIZ., *June 7, 1904.*

167 Board met at 2 P. M. for the purpose of opening bids and examining plans and specifications of the branch county jail to be built at Bisbee.

Members present: J. J. Bowen, Chairman, William Pritchett. Absent, Thos. R. York.

A recess till 7:30 P. M. was taken in order that all the members might be present.

Evening Session.

Board met at 7:30 P. M. pursuant to adjournment. Members present: J. J. Bowen, Chairman, Thos. R. York; Absent, William Pritchett.

The matter of opening bids and examining plans and specifications for the branch jail at Bisbee, having been deferred to this time, the Board proceeds to the consideration of the same.

But one set of plans had been filed with the Clerk. These were submitted by Lee Garrett. While no fault was found with Mr. Garrett's plans, the Board was of the opinion that the structure should be one more *more* elaborate than the plans provided, and they ordered that new plans be called for.

Gid Graham appeared before the Board in behalf of B. F. Graham, and asked that an order be made closing the account of B. F. Graham as Road Overseer of the Bisbee Road District for the year 1902. Said Gid Graham exhibited receipt and statement, showing that B. F. Graham had delivered to his successor, J. C. Krigbaum, all receipts and moneys in his possession at the time the

168 resignation of the said B. F. Graham was accepted by the Board, which action of the Board is recorded in the minutes of April 12, 1902, on page 157 of Minute Book No. 5. The record of this office not containing information necessary to justify the Board in closing said account without obtaining information which could not be had at this time, the matter was deferred till the regular meeting in July.

In the matter of the settlement and compromise of the suit now pending in the District Court of the First Judicial District (Now Second Judicial District), of the Territory of Arizona, in and for the County of Cochise, wherein the Copper Queen Consolidated Mining Company is plaintiff, and the County of Cochise and M. D. Scribner, County Treasurer, and ex-officio Tax Collector, are defendants, the Board of Supervisors of Cochise County hereby adopt the following resolution, to-wit:

Resolved: That upon condition, and in consideration that said plaintiff in said cause shall dismiss said Cause in said Court, and pay to the said County of Cochise, the sum of five thousand dollars ($5,000.00) in full satisfaction and payment of the costs and expenses incurred by the defendants in said suit, and of the fees agreed to be paid by the Board of Supervisors of said county to its attorneys in said cause; and that said plaintiff shall further pay into the Treasury of the county of Cochise the sum of six
169 hundred and sixty-one dollars and forty-four cents ($661.44), which said sum together with the sum already paid by said company into the Treasury of said County at the valuation of five ($5.00) dollars per acre returned by said company upon sixty-five (65) Patented Mines, containing six hundred and thirty-six (636) acres, in the year 1901 makes the actual basis of valuation per acre of said Patented Mines in this compromise thirty-seven dollars and fifty cents ($37.50), thus making the total amount now to be paid by said company the sum of five thousand, six hundred and sixty-one dollars and forty-four cents (5,661.44) in addition to the sum paid by said plaintiff company for the taxes levied and assessed against it in said county for the year 1901. It is hereby stipulated that the assessed valuation of improvements stand as decreed by the District Court at the trial of said cause, and it is further stipulated, agreed and confessed by said Board of Supervisors of said County of Cochise, for and in behalf of said county, that said monies so paid by the Copper Queen Consolidated Mining Company, are and forever shall be deemed a full payment, satisfaction and acquittance of any and all sums of money due or to grow due from said company in any manner whatsoever, for or on account of taxes levied and assessed against said company for the year 1901, and that the said company be, and the same hereby is, forever released and dis-
170 charged from the payment of any other and further sum in the premises, for and on account of taxes for said year nineteen hundred and one; the said settlement being a compromise upon the terms aforesaid of said suit between the parties thereto.

The above resolution is submitted to the Board of Supervisors of Cochise County for adoption and entry upon its minutes; and upon its approval by counsel in the case for the defendants, and the present District Attorney of Cochise County, and its adoption by the Board of Supervisors, the total sums specified in said resolution will be promptly paid into the County Treasury of Cochise County by the Copper Queen Consolidated Mining Company.

"WILLIAM HERRING,"

Attorney for the Copper Queen Consolidated Mining Company.

The foregoing meets my approbation in substance and in form, if the sums mentioned are the sums agreed upon between the parties.

"ALLEN R. ENGLISH,"
Counsel for Cochise County and M. D. Scribner, County Treasurer, etc., in said Case.

I, D. L. Cunningham, District Attorney of Cochise County,
171 approve of the form of the foregoing settlement and compromise, and the resolution in relation thereto.

"D. L. CUNNINGHAM,"
District Attorney of Cochise County.

The following demands were audited, and allowed by the Board:

8E—420—Allen R. English, Att'y's fees in Copper Queen Consolidated case		$2,500.00
9E—424—H. M. Eckerman, carpenter work on C. house.		14.00
25F—423—Wm. Featherman " " " " " .		106.00
21G—426—Lee Garrett, building fence at Hospital.....		97.50
20G—427— " " " " " "		52.00
20J—421—B. F. Johnson, carpenter work on court house.		126.55
19J—422— " " " painting " " " .		148.00
438—425—J. Still, carpenter work on court house.....		80.00

Board adjourned subject to call.

J. N. GAINES,
Clerk Board of Supervisors.

I, H. E. Berner, Clerk of the Board of Supervisors of Cochise County, Territory of Arizona, do hereby certify that the
172 foregoing is a true and correct copy of the Minutes of the Board of Supervisors aforesaid of a meeting held on the 7th day of June, 1904, and are found written on pages 513, 514, 515 and 516 of Minute Book No. 5.

Given under my hand and seal of the Board of Supervisors this 24th day of November, 1908.

[SEAL.] H. E. BERNER,
Clerk of the Board of Supervisors of Cochise County, Arizona."

The hour of twelve o'clock, noon, having arrived, the further hearing of this cause was continued until 1:30 this afternoon.

TOMBSTONE, ARIZONA,
MONDAY, *November* 23, 1908—1:30 o'clock p. m.

Mr. ELLINWOOD: Mr. Berner may take the stand: it is a little out of order.

H. E. BERNER, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ELLINWOOD:

Q. Mr. Berner, you are the Clerk of the Board of Supervisors of this County?

A. Yes sir.

173 Q. At the present time?

A. Yes sir.

Q. And have custody of the records of the office, have you?

A. Yes sir.

Q. Have you made an examination of the records of the Board of Supervisors, minute entries, to ascertain whether the Board of Supervisors of Cochise County at any time prior to February 12th, 1908, or any time, or at all, by resolution or otherwise, directed that an action be brought against the Copper Queen Mining Company for the taxes in this suit?

A. I have.

Q. Copper Queen Consolidated Mining Company?

A. Yes sir.

Q. What did your examination disclose?

Mr. CLARK: We object; the record is the best evidence, and must speak for itself.

Mr. ELLINWOOD: The fact *that* there is no record.

Mr. CLARK: The Clerk may say that he has made an examination. It is his conclusion whether the record speaks to that effect or not.

Mr. JUDSON: To show that something is not in the record, you would have to produce all the records.

Mr. CLARK: If it is not in the record, that ends it; if it is in the record, counsel can show it.

174 Mr. JUDSON: We are proving that it is not there.

Mr. CLARK: That is not the way to do it.

Mr. JUDSON: I submit that it is just as relevant to prove that something is not in the record as it is to prove that it is in the record.

Mr. CLARK: We still object; it is a mere conclusion, stating the legal effects.

Mr. JUDSON: It is fact; not a conclusion.

Mr. CLARK: It is an attempt to testify to the legal effect of something. We will say that there is something of record in the Supervisors' office that does go to that question, and we are going to show it before this case is over.

The COURT: What is your objection to the testimony?

Mr. CLARK: That the record will have to speak as to that.

Mr. ELLINWOOD: That is all that I am asking for; what he found.

The COURT: I am not sure that that objection is entitled to be sustained on that ground, but if the testimony is objected to, it will be incumbent upon the defendant to show that.

Mr. ELLINWOOD: That will be all of Mr. Berner for the present.

Witness excused.

Mr. ELLINWOOD: Mr. Gaines.

J. N. GAINES, being recalled as a witness on behalf of the defendant, and having been duly sworn according to law, testified
175 as follows:

Direct examination by Mr. ELLINWOOD:

Q. I believe you stated that you were the Clerk of the Board of Supervisors on the 8th of June, 1904?

A. I didn't understand your question, Mr. Ellinwood.

Q. I believe you stated that you were the Clerk of the Board of Supervisors of this County on June 8th, 1904?

A. Yes sir.

Q. I hand you a letter marked "Exhibit 7", 11-23-08", I will ask you if that signature is your hand writing?

A. Yes sir.

Q. Who wrote that letter?

A. I did.

Q. What did you do with it?

A. Well, I don't know that I remember just the incident exactly. I wrote it to Mr. Scribner, but I don't remember whether I handed it to him, or mailed it to him.

Q. Did you either hand it to him or mail it to him?

Mr. CLARK: We object to that, and move that it be stricken out. We don't know what the letter is; we have not had the pleasure of seeing it, and therefore at this stage, it is immaterial what
176 the witness did with the letter, and we object.

Mr. ELLINWOOD: If he wrote the letter and filed it away, it would not have the same effect in evidence as if he delivered it. I would like to ask one question, and then you can make your objection.

Q. Did you deliver this, or cause it to be delivered to Mr. Scribner?

Mr. CLARK: We object strenuously, because it is not shown in evidence what that letter is, or whether it was admissible in evidence, or whether, if it was delivered to Mr. Scribner, it would have any bearing on this question.

Mr. ELLINWOOD: Now, we offer it in evidence.

Mr. CLARK: We object, if Your Honor pleases.

The COURT: What is the objection?

Mr. CLARK: The objection is, it does not purport to be a copy of the order or resolution of the Board of Supervisors, the Board can only act lawfully by resolution, duly entered of record. This so called letter is the Clerk's interpretation of what the Board may have done. He is undertaking to state the legal effect of something that he assumes that the Board of Supervisors may have done. It is in no sense a certified copy of the order of the Board of Supervisors; it has no standing as an official order, or any part of an official record that such action was taken as he attempts to describe. Further, that

it is incompetent, irrelevant and immaterial, and does not
177 bear upon any issue in this case, and does not tend to sustain the plea in abatement.

The COURT: The objection is sustained; I don't see the materiality of it.

Mr. ELLINWOOD: Note an exception. Now, we offer to prove by the witness that the letter marked "Exhibit 7, 11-23-08" was delivered or caused to be delivered by the witness to M. D. Scribner, the ex-officio Tax Collector of Cochise County, Arizona, on the 8th of June, 1904.

Mr. CLARK: We object. That will be an indirect effort to get into the record something that the Court has just excluded.

Mr. ELLINWOOD: We can make our offer.

Mr. CLARK: We say no, and what he did with it does not tend to support the plea and abatement. To show what was done with an excluded document, is another thing.

Mr. JUDSON: I wish to call the Court's attention to a matter that I did not have at hand when the question was up a moment ago, as to the testimony of a custodian of a document as to the absence of a record. The rule laid down by Mr. Wigmore in his treatise on "Evidence," Volume 2, page 1230, is as follows: "Where a fact could only be ascertained by the inspection of a large number of documents made up of very numerous detailed statements, it is obvious that it would often be practically out of the question to apply the present principal of requiring the production of the entire mass of documents and entries to be perused by the jury or read
178 aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of a competent witness who has perused the entire mass, and will state summarily the net result. Such a practice is well established to be proper." Mr. Wigmore states that as the law in his text, and recites Hoffman v. Pike, 114 Michigan 1. "A clerk was allowed to testify that no record of a certain sort existed. On the proof of the absence of entries, the rule is settled that where the party has the burden of proof of showing that there is no record, the proper method of proof is to prove it by the custodian. It is impractical to produce books running over three or four years and read them, and that is laid down to be the law by Mr. Wigmore.

Mr. CLARK: The point we make is, that even if the records were admitted, they would have no effect.

The COURT: The point to which you refer, and which the counsel makes, but as I said, I am not inclined one way or the other. I don't think it necessary to rule upon it on the point raised by him. In other words, if you establish the fact that they made an order that that tax should be omitted from further suit it would be incumbent upon them to show that there was a subsequent order.

179 Mr. ELLINWOOD: It is alleged in our pleadings; we take the burden of proof in our pleading, setting this up.

The COURT: Yes, I see you did, and it is incumbent upon you to

establish that point. The objection to the offer to prove that the letter was delivered will be sustained. The fact that the Clerk delivered this letter is immaterial.

Q. Mr. M. D. Scribner was the then ex-officio Tax Collector of Cochise County?

A. Yes sir.

Witness excused.

BEN GOODRICH, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ELLINWOOD:

Q. Do you know Mr. M. D. Scribner?

A. Yes sir.

Q. Do you know where he is at this time?

A. I know I got a telegram from him——

Mr. CLARK: We object; it don't make any difference where Mr. Scribner is.

Mr. ELLINWOOD: I think the counsel will see the purpose of this testimony a little later, which will do no harm.

Mr. CLARK: Go ahead. Under the stipulation, it is objected to.

180 A. I got a telegram from Mr. Scribner, I think, the 16th of this month, and he was in New Orleans. He telegraphed me he had some suit there that was to be heard.

Q. It is the same M. D. Scribner who was Tax Collector?

A. Yes sir; he wanted me to look up some litigation he had; he telegraphed me that his father-in-law had died, and he was down there attending the funeral.

Q. How long has he been there, do you know?

A. Well, I don't know; I got a letter from him at New Orleans about ten or fifteen days ago, and before that I got a let-er from him dated Boloxi, Mississippi, but he had gone to New Orleans where his father-in-law lived, where he died, on the 16th.

Mr. CLARK: I don't see the materiality of it.

Witness excused.

Mr. ELLINWOOD: If the Court will turn to Paragraph 252. I wish to read from the record at the former trial the testimony of Mr. Scribner.

The COURT: You want to establish that he is out of the Territory?

Mr. ELLINWOOD: Yes sir. Now, I have the testimony at the former trial, and while the testimony will probably be objectionable under the same theory that the Court has just expressed, I want to offer this in evidence.

181 The COURT: Very well.

Mr. CLARK: I would like to look at that transcript.

Mr. ELLINWOOD: I am going to read this testimony here; about five or six lines.

Mr. CLARK: In the first place there is no attempt on the part of the counsel to show that Mr. Scribner was ever subpœnaed, or if attempted to be subpœnaed, there is no showing of any diligence of any kind to procure his testimony. Furthermore, Paragraph 2537, the one read by counsel, is limited to a subsequent trial of the same case. The witness at a trial of a certain action if he be beyond the jurisdiction or dead may be thereafter read in the same case, or a subsequent trial of the same case, and not in a separate and distinct case. This is another action. The record shows that that case was tried and disposed of.

Mr. ELLINWOOD: This record that I am reading from is the record taken before Judge Nave.

Mr. CLARK: I understood that you were offering the testimony of Mr. Scribner in the other case.

Mr. ELLINWOOD: No, not at this time.

Mr. CLARK: I withdraw that part of the objection.

The COURT: I would suggest to counsel, if I understand the point, that you could find some one very easily to testify to the fact that Mr. Scribner is not here. I happen to know personally very well
182 that Mr. Scribner is out of the Territory, and was gone several weeks before this case was set.

Mr. CLARK: I understand that counsel is offering the testimony of Mr. Scribner as appears upon pages nine and ten of the transcript of the evidence on the first trial of this case. Is that right?

Mr. ELLINWOOD: Yes.

Mr. CLARK: I object to it. I object to it because it is immaterial, and incompetent, because it relates to a letter which has already been excluded as evidence in the case.

The COURT: Let's see it.

Mr. ELLINWOOD: That is correct; this is the same testimony as Mr. Gaines testified about, and this is the testimony of Mr. Scribner that he received it, and I simply want to make the record of the matter.

The COURT: Yes.

Mr. CLARK: Of course, I want to supplement my objections by saying that I want to object to this testimony for the same reason as I did to the testimony before the Court to the letter.

The COURT: The objection will be sustained.

Mr. ELLINWOOD: I would like to read it into the record so that——

The COURT: You would have the benefit of your objections?

Mr. ELLINWOOD: Yes sir. The defendant offers the following testimony of M. D. Scribner, who testified upon the former
183 hearing of this case, No. 5154, on the 6th day of May, 1908, as shown by the transcript of the Reporter's notes of said trial, the same being as follows:

"Direct examination by Mr. ELLINWOOD:

Q. Your name is M. D. Scribner?

A. M. D. Scribner, yes sir.

Q. On the 8th of June, 1904, you were the Treasurer and Ex-Officio Tax Collector of the County of Cochise?

A. I was.

Q. Territory of Arizona?

A. Yes sir.

Q. I will ask you to look at this letter and see if you ever saw it before?

A. I have seen it before, yes sir.

Q. You received this letter from Mr. Gaines as Treasurer and Tax Collector?

A. Yes sir.

Q. From him as Clerk of the Board of Supervisors?

A. Yes sir.

Mr. ELLINWOOD: We now offer it in evidence, may it please the Court.

Objection. Said paper was marked "Exhibit 5"."

Mr. ELLINWOOD: I suppose the objection to the testimony is sustained?

184 The COURT: Yes.

Mr. ELLINWOOD: Note an exception. Swear Mr. Wilcox. Mr. Clerk, be sworn.

GEORGE B. WILCOX, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ELLINWOOD:

Q. Mr. Wilcox, you are the Clerk of this Court?

A. Yes sir.

Q. And have charge of the exhibits?

A. Yes sir.

Q. And had at the former trials?

A. Yes sir, the most of them.

Q. I will ask you "Exhibit 5" at the former hearing of the case on May 6th, whether that is the same letter now marked "Exhibit 7"?

A. Yes sir.

Witness excused.

Mr. ELLINWOOD: That is all upon the plea in abatement.

Mr. CLARK: We assume that the Court will dismiss the plea in abatement for the reason that there is no testimony to sustain it or tend to sustain it. There is only one thing before the Court, and that is the so called order of the Board of Supervisors dis-

185 missing another action, and attempting to compromise the taxes involved in that action. The validity of that attempted act we will establish by the Supreme Court of this Territory, in so far as counsel undertakes to construe this as an order that that particular tax be omitted from any suit pending or thereafter to be brought. We merely have to say that if such an order is endeavored, it is void, because the Board of Supervisors could not make such an

order as that; they did not have the power to do that. If there is such an order here, it must be an order to that effect, an express order, and there is no order to that effect. I call Your Honor's attention further that that particular resolution was before the Supreme Court of the Territory, and in that particular action that resolution was held to be null and void, and therefore it could not have any weight in this case of any kind.

The COURT: No argument desired on either side of this matter.

Mr. CLARK: No.

The COURT: I feel inclined to overrule and deny the plea in abatement. I do not find any evidence in the case for the omission from the matter in controversy as being a contested case, but rather a receipt which would take it out of the class of cases of that kind.

186 The hour of twelve o'clock, noon, having arrived, the further hearing of this case is continued until this afternoon.

TOMBSTONE, ARIZONA,
TUESDAY, *November* 24, 1908, 2:30 o'clock p. m.

The COURT: I have not succeeded in examining half the authorities I desire to. I find that it *as*-sumes more time than I expected. I have used the entire noon hour except what was necessarily taken up by some other matters. There was one point that was imperfectly suggested to me that I would like to ask counsel on either side if it has been given any attention by them. The counsel for the plaintiff stated that this assessment was made in the spring of 1901 before the 1901 Revision was in force, and that the Revision of 1901 provided for a remedy, or a course of procedure that might be taken by persons in the situation of the defendant here, and that there was an action taken and the papers in that filed just one day before the 1901 statutes went into effect. That has led me to ask myself whether the attitude would be at all different if this assessment was levied under the law as it stood prior to 1901 than if levied under the law as we have it in the Revision of 1901. I started out to satisfy myself on that line, but I found to do so I would have to examine our statutes of 1887, and then the different Acts of
187 our Legislature up to and including 1899, and that would consume the entire time that I had at my disposal, but I suppose that counsel on both sides have done so, yet that was not touched on by counsel on either side of the case except the criticism of one counsel of the course of the other. Can counsel on either side advise me in regard to that?

Mr. ELLINWOOD: If I understand it, the statute of 1887 was in force at the time the Act of 1901 was passed.

The COURT: Well, we have to consider perhaps the dual features in this case, for the one of which we look at our law of 1901 as amended, or the law of 1887 as amended up to 1901 for the legality of the assessment, for the requirements to be made in the manner of the assessment, then for the collection under the delinquent provision; for the collection of delinquent taxes, which is

another feature of this case, we are governed entirely by the law of 1903, which was an amendment to the law of 1901, and with which, of course, the law prior to 1901 would not have anything to do, and any differences between the law prior to 1901 and the law of 1901 would be absolutely immaterial as to one feature of the case, but such differences might be material as to the other features of the case. So that there has been no material changes in the law other than changing from February to March, for that for the
188 information of which I speak, we would only have to look at the statutes of 1887——

Mr. CLARK: Of 1901 as to the method of assessment.

The COURT: The law of 1887 and 1901 are exactly alike as to the method of assessment.

Mr. CLARK: I think so.

The COURT: Let me ask you again, if it is understood, to save me examining the books, your examination of the case has satisfied you that the only difference between the law of 1887 and the law of 1901 were first the substitution of "February" for "March," and second, the requirement of the law of 1901 that before proceedings for relief from an over-valuation of a void assessment, it would be necessary to pay or deposit the amount of the tax as called for by such valuation or assessment?

Mr. CLARK: That is our understanding.

Mr. ELLINWOOD: Yes, sir.

The COURT: Further than those two features of the case, it would be immaterial whether the assessment was made under the one law, and the delinquency proceeding under the other?

Mr. CLARK: Yes sir.

The COURT: In the trial of this case upon the facts, about how long do you presume it would take for the introduction of the evidence in the case?

Mr. CLARK: I would not venture on an opinion as to that; it took the whole day before.

189 Mr. ELLINWOOD: Yes, more than a day.

Mr. JUDSON: I should think, considering that the case has been so thoroughly argued on the motion and the main legal features, that there would not be very much time taken up in the argument as to the admissibility of the evidence.

Mr. CLARK: If that be true, it won't take long. The time principally was taken before on the examination made by the defendant.

The COURT: I asked that for the reason that I have not determined the demurrers. I have not made the examination I desire of the authorities that are on the table, and it might be that we could take up the testimony in the case, and I can then have this evening and night and tomorrow morning for a further examination of those citations before ruling upon the demurrers.

Mr. CLARK: No objection on our side.

Col. HERRING: None on our side.

The COURT: I would prefer that course. Now let me see; I don't know that I will rule on any of these.

Mr. JUDSON: I would suggest that when the evidence is introduced that the objections be made, and the evidence go in subject to the future ruling of the Court on such objection.

The COURT: Very well, let it go in subject to the objection, and to be ruled on at the final hearing of the case.

Col. HERRING: It will be conceded that the testimony is taken subject to the objection, and that counsel, when the Court
190 finally rules upon matters, counsel will be permitted to insert all their objections in the record.

Mr. CLARK: No, I won't consent to that. If there is any objection, it must be made in open Court and taken down by the stenographer, and the grounds of objection given. The same rule will apply as far as we are concerned.

The COURT: I expect it would be well to have the grounds on which the objection is made stated, because some times an offer of testimony would be excluded on one ground, where it would be admitted on a different ground.

Mr. CLARK: Exactly.

The COURT: The Court would like to have before it, the grounds on which the objection is urged.

Mr. CLARK: Are we ready now to proceed?

Mr. ELLINWOOD: Yes sir.

Mr. CLARK: If Your Honor pleases, I desire now to introduce the original list of the property of the Copper Queen Consolidated Mining Company for the year 1901, as made out and verified through its General Manager, Walter Douglas; this being the original list.

Mr. ELLINWOOD: Now, may it please the Court, the paper will speak for itself without argument on behalf of counsel as to what it contains, and when it is offered we wish to make an objection.

Mr. CLARK: We offer it now.

191 Mr. ELLINWOOD: May it please the Court, we object to it as incompetent, irrelevant and immaterial; that a list made out by a tax payers and returned to the Assessor is only valuable as a memorandum for the Assessor, to aid the Assessor in discovering all the taxable property in his jurisdiction to the end that it may be assessed, and the assessment list is a *mere* preliminary memorandum for the Assessor's use, and not evidence in a suit for the collection of taxes under the statute.

The COURT: What are you reading from?

Mr. ELLINWOOD: I am reading from State v. Burch, 85 Southwestern at page 363, the reading page.

Mr. CLARK: A Missouri case?

Mr. ELLINWOOD: Yes sir.

Mr. JUDSON: An Arizona case by adoption.

Mr. CLARK: We don't say so.

Mr. ELLINWOOD: And State v. Carr in the 77 Southwestern at page 543, also the further case of the State ex rel Flenge v. Burrows, 74 South Western, page 610, reading page 612.

The COURT: What State is that from?

Mr. ELLINWOOD: Missouri, and rendered on March 31, 1903.

Mr. CLARK: I don't care to reply to the suggestion, otherwise than to suggest to the Court that counsel's statement that the law which he has quoted from Missouri is the law of Arizona by adoption. Counsel errs in that. The law of Arizona requiring
192 the tax payer to hand in a list of his property to the Assessor was adopted verbatim et literatim from Illinois, and has so been held by the Supreme Court of this Territory in the case of Atlantic and Pacific Railroad v. Yavapai County, 21 Pacific, 768. That portion of the statute of Arizona, or of the revenue statute of Arizona was not touched or infringed upon by the adoption of the delinquent tax statute from Missouri; it left it absolutely unchanged.

Mr. JUDSON: My answer to that, so that it may go into the record, that this is a proceeding under the law adopted from Missouri, and the question of the creation of the state's lien, and the decisions of Missouri are to the effect of the tax payer's lien must prevail.

Mr. CLARK: This is offered upon the theory based upon the decisions of Missouri that this list is a memorandum, and that theory is based upon the statute not of Illinois or Arizona, but of Missouri.

Mr. JUDSON: It is a memorandum for the purposes of this kind of a proceeding for the creation of a states' lien.

Mr. CLARK: If the statutory requirement is different in Missouri, and it is different from that of Illinois, it is here, and the question of whether this is a mere memorandum or not does not proceed under the statutes or decisions of Missouri, but of Illinois.
193 Mr. JUDSON: It is admitted subject to the objection?

The COURT: Let it go in.

Mr. CLARK: It is marked in the old case as "Defendant's Exhibit A".; it will be offered as plaintiff's Exhibit A in this case, and I will ask the stenographer so to mark it.

(Said paper was marked "Exhibit A," and was introduced in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT A.

"Schedule A.

Statement of real estate, held, owned, claimed by, or in possession of Copper Queen Consolidated Mining Company, P. O. Address Bisbee, Cochise County, Territory of Arizona, subject to taxation for the fiscal year 1901.

65 Patented Mining Claims, viz:

Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, (Dividend-Wedge-Ellie-Coon,) East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks,

Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunrise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars & Stripes, South View, Tack, Union and Virginia.

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	Land Val.	Imp. Val.	Total.
636 acres, ...	$3,180.00	$55,431.76	$58,611.76
Improvements consist of store building, warehouses hospital buildings, office and doctor's residence; 3 houses on Malvina Nos. 48, 49, 50			
Land in Bisbee 196 feet frontage on South side of Main Street, extending from Copper Jack Mining Claim west End Line in Westerly direction, on which are located Doctor's office and Library Building	$4,960.00	$7,800.00	$12,760.00
20 ft. frontage on North Side of Main Street, on which is located store occupied by Dan Hankinds, No. 6	$200.00	$750.00	$950.00
106 ft. frontage on North side of Main Street, extending from Copper Jack Mining Claim West End Line in a westerly direction fenced in a Park, and not occupied by any building except fire hose house....	$1,060.00	$.....	$1,060.00
Lot on North Side of Main Gulch on which is located Supt's Dwelling, &c. No. 112	$1,000.00	$2,000.00	$3,000.00
Lot on North Side of Main Gulch, on which is located 'The Bessemer.' No. 111...	$300.00	$3,000.00	$3,300.00

Part of Lot not on Copper Jack, purchased from Schmidt, 26-1000 of an acre	$250.00	The valuation of the improvements on these lots is the valuation upon the hotel building.	
Part of Lot not on Copper Jack purchased from McKim, 78-1000 of an acre	$750.00		
Part of Lot not on Copper Jack purchased from Chisholm, 57-1000 of an acre	$500.00	$10,000.00	$11,500.00
196			
These lots abut upon the Copper Jack Mine.			
Store at Naco. (Do not own land)	.....	2,340.00	$2,340.00
	$12,200.00	$81,321.76	$93,521.76

as far as completed on the first Monday in February, 1901.

Statement of Real Estate and Personal Property Held, Owned, Claimed by or in Possession of Copper Queen Consolidated Mining Co., P. O. Address, Bisbee, Cochise County, Territory of Arizona, Subject to Taxation for the Fiscal Year 1901.

Description of real estate.	Lot.	Bl'ck.	City or Town.	Sec	Twp.	R'nge.	Acre.	Value of land.	Val. of Impr's $	Value. cts.
[Continued.]										
Total value of real estate as per schedule 'A' attached,										93,521.76

Description of Personal Property.

Household furniture, value $1,200. Library $300...	1,500.
Watches, Jewelry and Plate, value $—	
Sewing machine, value $—	
Pianos and Organs, $—	100.
197 Merchandise of any and all kinds, Naco $13,875—Bisbee, $76480	90,355
Money on hand or on deposit, $—	
Money at interest	
Solvent debts over indebtedness, ...	
Property of any kind in trust for others.....	
Billiard tables, No. —, values $—	
Bar and Saloon fixtures, value $—	
Safe and office furniture, ...	1,500
Stallions, No. —, value $—	

Work horses, No. 20, Value $20,		400
Restaurant, Furniture and Fixtures,		
Work mules, No. —, Value $—		
Stock horses, No. —, Value —		
Saddle horses, 1st Class, No. —, value		
2nd Class No. —, Value, $—		
Bulls, thoroughbred and graded,		
Dairy cows,		
Cows and heifers, thoroughbred and graded,		
Stock Cattle, No. brand —, Value $—		
Work oxen, No. —, Value $—		
Jacks and Jennies,		
Sheep, No. —, Value, —		
Goats, No. —, Value, —		
Hogs, No. —, Value, —		
Wagons, buggies and other vehicles,		610
Harness, saddles and bridles, value $195.00;		
Bicycles, value $—		195.
Mowers, reapers and hay rakes,		
198 Hay presses and farming implements,		
Lumber and lagging,		11,568
Hoisting works, pumping and other machinery at mines,		44,641
Quartz mill,		
Smelting works and appurtenances,		112,451
Mill, mine and smelter supplies of any and all kinds including coke and coal		5,073
Surveyor's instruments, value $125; surgical instruments, value $—		125
Assaying outfit, value $100; tools and machinery, value $— included on other items, $—, $—		100
Telegraph lines, — miles of — Water Rights, $—, Poultry, $—		
Telephone lines — miles of —, Cord wood $—		
Any other property not above numerated, Cars and car track,		6,000
Total value of personal property, $274,618		
Total valuation,		368,139.76

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, Walter Douglas, do solemnly swear that the foregoing list contains a full and correct statement of all property subject to taxation which Copper Queen Consolidated Mining Company owned, claimed possessed or controlled at 12 o'clock M. on the first Monday
199 in February last, and which is not already assessed this year, and I have not in any manner whatsoever transferred or disposed of any property, or placed any property out of said county or

my possession for the purpose of avoiding any assessment on the same, or of making this statement.

(Sign here) WALTER DOUGLAS.

Subscribed and sworn to before me this 2 day of July 1901.

WALTER F. FIFE, *Assessor.*

—— ——, *Deputy Assessor.*

Read this: No one but the Assessor must insert valuations; that is the Assessors's duty."

On the reverse side of said Assessment List appears the following words and figures:

"Attention.

Read the Following Notice Before Filling up the Blank.

OFFICE OF THE ASSESSOR COCHISE COUNTY, A. T.,
FEBRUARY 1ST, 190–.

Your attention is called to the following section of the Re-
200 vised Statutes of Arizona (1887), and it is the intention to strictly enforce the same:

2632. (Sec. 6) All taxable property must be assessed at its full cash value; the term 'cash value' whenever used in this Act shall mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor. Land and improvements thereon shall be separately assessed.

2641. (Sec. 15) It shall be the duty of every person owning or having charge of, or under his control, property in this Territory, subject to taxation, and as in this Act provided, to make out and deliver to the Assessor between the first Monday in February and the first Monday in June in each year, a correct list of the same as required by law, whether he shall receive from the Assessor a notice or demand to do so or not; and every assessment made against property subject to taxation shall be valid whether such notice or demand was received or not.

2643. (Sec. 17) If any person shall wilfully make or give under oath or affirmation, a false list of his, her or their taxable property under his, her or their control, such person shall be deemed guilty of perjury, and upon conviction thereof shall be punished therefor as by law provided for the punishment of perjury; and any prop-
erty wilfully concealed, removed, transferred or misrepre-
201 sented by the owner or agent thereof, to evade taxation, shall upon discovery, be assessed at five times the amount of tax for that year which would otherwise have been assessed upon it, and the assessment so made must not be reduced by the Board of Equalization, and fifty per cent of the amount of such additional tax, when collected, shall be paid to the person or persons who shall furnish the information which reveals the property so concealed, transferred or misrepresented, and the remaining fifty per cent after deducting the usual percentage for collection, shall be paid into the treasury in the same manner as other taxes.

(2644. Sec. 18) If any person shall give the Assessor or his deputy a false name, or shall refuse to give his or her name, or shall refuse to give a list of property as by this act required, or shall refuse to swear or affirm to such list, he or she shall be guilty of a misdemeanor and shall be arrested on complaint of the Assessor or his deputy, and upon conviction before a justice of the peace, he or she shall be punished by a fine of not less than $10 nor more than $300, or by imprisonment of not less than two days or more than three months, or both by such fine and imprisonment.

2645. (Sec. 19) If any person with whom the Assessor shall have left a notice or demand to make out a list of property
202 for taxation, shall have no property which by this act he is required to list either on his own account or on behalf of others, he shall set forth said fact in the blank left with him by the Assessor for that purpose, and shall make oath to the truth thereof and return the same to the Assessor on or before the first Monday in June.

You will please fill out this blank and return it as soon as possible.

Cochise County Assessment List. Of Copper Queen Con. M'g Co. Filed July 2, A. D. 1901.

WALTER F. FIFE, *Assessor.*"

Mr. CLARK: I now desire, if Your Honor pleases, to offer a certified copy of so much of the original assessment roll of Cochise county for the year 1901 as contains the assessment of the Copper Queen Consolidated Mining Company for that year.

Mr. ELLINWOOD: The defendant objects to the introduction of this testimony—the defendant objects to the testimony wherein it recites as follows: "The name of the tax payer: Copper Queen Consolidated Mining Company. Lands and city and town property, description of: Bisbee, 65 Patented Mining Claims: Atlanta,
203 Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sunrise, Space, Surprise, Silver Spray, Silver Bear, Sun Rise, Sunnyside, Sacramenta, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars & Stripes, South View, Tack, Union, Virginia. Number of acres, 636. Value of land and town property, $3,180.00. Value of improvements, $55,431.00", for the reason that it appears therefrom that the descriptions of each and all of said several patented mining claims is so vague and indefinite that no valid judgment can be rendered and enforced as a lien against any of said patented mining claims, tracts or lots of land attempted to be described therein.

Because it appears therefrom that sixty-five separate and distinct

tracts or parcels of real estate, to-wit: Sixty-five separate and distinct patented mining claims were not separately listed and assessed, but were listed and assessed and set down upon the tax assess-
204 ment roll of said county as one parcel or tract of land, and thus assessed to the defendant.

That said sixty-five patented mining claims, being separate and distinct tracts or parcels of land, were not separately valued, and the amount of taxes on each separately set down and assessed against the same, but that the whole sixty-five mining claims were valued as an entirety and in gross at the sum of $3,180.00. That no valid judgment can be rendered describing the land, lots and tracts of real estate upon which the taxes are found to be due upon each respectively, and constituting the amount of taxes and interest found to be due upon each of said tracts, or parcels of land up to the rendition thereof, and decreeing that the lien of the territory be enforced against each of such tracts and lots of real estate to the amount of the taxes due therefrom.

That it appears therefrom that there has been no legal assessment, levy or return against said sixty-five patented mining claims, and because it appears therefrom that the alleged taxes against said sixty-five patented min-g claims, as shown upon said assessment roll, are founded upon proceedings without legal authority, and are wholly nugatory and void.

For the further reason that there is a varience between the attempted description of said sixty-five patented mining claims
205 as set forth in paragraph 4 of plaintiff's complaint and the assessment roll offered in evidence, in this: That the said description contained in said paragraph described or attempts to describe a mining claim by the name of "Dividend Wedge," and another by the name "Ellie Coon", and that said exhibit contains three alleged patented mining claims, one described as "Dividend", another by the name of "Wedge", and another by the name of "Ellie Coon". That said certified copy of said assessment roll describes one of said mining claims by the title of "Little Joker", and one by the name or designation of "Sunrise", and another by the name of "Sun Rise". That the description of the patented mining claims in paragraph IV does not contain any mining claim by the name of "Little Joker", or by the name of "Sunrise".

That said certified copy of said assessment roll offered in evidence contains the name of an alleged mining claim by the name of "Belle Isle." That paragraph IV of plaintiff's complaint contains no mining claim by the name of "Belle Isle," but contains a mining claim by the name of "Belle" and "Isle."

The defendant further objects to that part of the assessment roll reading as follows: "Value of improvements, $55,431.00" and the following paragraph "Improvements consisting of store buildings, warehouses, hospital building, office and doctor's residence,
206 and three houses No. 48 and 49 and 50, First District," for the reason that said certified copy of said assessment roll fails to show upon what tracts or lots of real estate, if any, said store, building, said ware houses, said hospital building, said office and said doctor's residence are situate, and because it appears upon

the face thereof that the description of the several alleged improvements therein set forth is so vague and uncertain that no valid judgment can be rendered to enforce a lien against any of said tracts, or lots of land for the taxes on said alleged improvements. Because it appears therefrom that said store building, said ware house, said hospital building, said office and the said doctor's residence were not separately assessed and listed as improvements upon and against any separate tract or lot of real estate, and were not separately valued, and the amount of taxes upon each separately set down and assessed against the same, or any said tract or lot of real estate, but that the same were valued as an entirety and in gross at the sum of $55,431.00, without reference to any particular tract or lot of real estate, and because thereof, no valid judgment can be rendered for taxes upon said alleged improvements against any tract or lot of real estate, nor can any valid decree be rendered declaring a lien to exist in favor of the Territory for the amount of the alleged taxes on said improvements set forth in said assessment roll against any tract or lot of real estate. Because it ap-
207 pears therefrom that — no legal assessment, levy or return of the alleged taxes other than pretended to be set forth, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

And for the further reason that there is a variance between paragraph IV of plaintiff's complaint and the exhibit offered in evidence, in this: That the said complaint recites as follows: "Improvements thereon, consisting of store building, ware houses, hospital building, office and doctor's residence, being assessed at $55,431.00," whereas said exhibit sets forth in the column "'Value of Improvements,' "$55,431.00," and then follows the wording "Improvements, consisting of store building, ware houses, hospital building, office and doctor's residence, and three houses No. 48, and 49 and 50, First District," without any designation of any kind except as above stated.

For the further reason that it is impossible to tell from said offer whether the said three houses, No. 48 and 49 and 50, First District, were included as a part of the assessment upon, or improvements upon certain alleged mining claims set down as $55,431.00, or whether the same were included within the subsequent paragraph "196 feet frontage, south side of Main Street" set down
208 upon said roll as $7,800.00. That there is a variance between the allegations of said paragraph of said complaint in this: This said description recites in said complaint: "Three houses, No. 48, 49 and 50, First District. 196 feet frontage on South Side of Main Street, in Bisbee, extending from Copper Jack Mining Claim, west end line, in a westerly direction, on which are located doctor's office and library building, $4,960.00—$7,800.00," whereas said exhibit sets forth as follows: "Improvements, consisting of store building, ware house, hospital building, office and doctor's residence and three houses, No. 48 and 49 and 50, First District."

"196 feet frontage south side of Main Street extending from Cop-

per Jack Mining Claim, west end line, in westerly direction, on which are located doctor's office and library building, $4,960.00. Value of improvements and town property, $7,800.00. Value of improvements," because it appears upon the face thereof that the description of said houses, number- 48 and 49 and 50, First District, is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said houses attempted to be described therein. And for the further reason that said houses, numbered 48 and 49 and 50 are not separately assessed as improvements upon any separate tract or lot of real estate, and are not separately valued, and the
209 amount of taxes on each separately set down and assessed against the same, or against any said tract or lot of real estate, but the same were valued as an entirety, and in gross, without reference to any particular tract or lot of real estate, and because no valid judgment can be rendered for taxes upon said houses 48 and 49 and 50 against any said tract or lot of real estate, nor can any valid decree be entered, declaring a lien to exist in favor of the Territory for the amount of the alleged taxes on said houses 48, 49 and 50 against any tract or lot of real estate, because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes set forth in said offer.

And for the further reason that said real estate described as "196 feet frontage on the south side of Main Street in Bisbee, extending from the Copper Jack Mining Claim, west end line in a westerly direction, on which are located doctor's office and library building" is so vague and uncertain that no judgment can be rendered to enforce a lien against any said tract or lot of land attempted to be described therein, and because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes therein set forth, because it appears that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit offered in evidence, reading as follows: "20 feet on the north side
210 of Main Street. Store No. 6. Value of land and town property, $200.00. Value of improvements, $750.00" for the reason that it appears therefrom that the description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein, and because it appears therefrom that there is no legal assessment, levy or return of the alleges taxes set forth therein, and because it appears therefrom that the alleges taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit reading as follows: "106 feet fronting on north side of Main Street, extending from Copper Jack Claim, west end line, in a westerly direction, fenced in as a park, and not occupied by any building except 'fire hose house.' Value of land and town property, $1,060.00," for the reason that it appears therefrom that said tract or lot of land attempted to be described therein is so vague and uncertain that no

valid judgment can be rendered to enforce a lien against said tract or lot attempted to be described therein, or any said tract or lot of land, and because it appears therefrom that there has been no legal assessments, levy or return of the alleged taxes therein set
211 forth, because it appears therefrom that the alleged taxes therein set down are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit offered in evidence, reading as follows: "Supt. dwelling, etc. No. 112, First District, $1000.00." Under the head of "land and town property, $1000.00." "Value of improvements, $2000.00," for the reason that it appears therefrom that the description or the attempted description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate, and because it appears therefrom that there has been no legal assessment, levy or return of any taxes as set forth in said exhibit, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

And the defendant further objects to that part of said exhibit readings as follows: "The Bessemer, No. 111, First District. Value of land and town property, $300.00. Value of improvements, $3000.00," because it appears therefrom that the alleged description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of land described therein, or any said tract or lot of land, because it appears therefrom that there has been no
212 legal assessment, levy or return of any taxes on *on* said land, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

And the defendant further objects to that part of said certified copy of said assessment roll offered in evidence, reading as follows: "Number of Acres. 26-1000. Value of land and town property, $250.00," for the reason that it appears therefrom that the description of said — or attempted description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein, and for the further reason that there has been no legal assessment levy or return of the alleged taxes set down upon said roll, and for the further reason that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are nugatory and void.

The defendant further objects to that part of said assessment roll reading as follows: "Part of lot. Number of acres, 78-1000. Value of land and improvements, $750.00," for the reason that it appears therefrom that the attempted description of said tract or lot of real estate is so vague and uncertain that no valid judgment can
213 be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein, and because it ap-

pears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes set forth in said exhibit, because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are nugatory and void.

And defendant objects to that part of said certified copy of said assessment roll reading as follows: Under the words "Number of lot," three dittos " " ", "Number of Acres, 57-1000 acres. Value of land and town property, $500.00. Value of improvements, $10,000.00," for the reason that it appears therefrom that said lot *of* tract of land attempted to be described therein is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of land, or any said tract or lot of land because thereof, and because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes set forth therein, because it appears therefrom that the alleged taxes therein set forth *was* without legal authority, and are wholly nugatory and void, and because there is a varience therein, in this: That in said complaint, paragraph IV of said complaint, the same is set down in the sum of one thousand dollars, and in said
214 exhibit in the sum of ten thousand dollars.

The defendant objects to that *that* part of said exhibit set forth in said exhibit as follows: "Store at Naco. Value of improvements, $2340.00," for the reason that it appears therefrom that the description, if any, *is* attempted to be described and listed, is so vague and uncertain that no judgment can be rendered for the amount of said alleged taxes against any said tract or lot of real estate, and no valid decree can be entered declaring a lien to exist in favor of the Territory against any said tract or lot of real estate because thereof, and because it appears therefrom that there has been no legal assessment, levy or return of the taxes therein set down, or any said taxes, and because it appears therefrom that the alleged taxes therein sued for are founded upon proceedings without legal authority, and are wholly nugatory and void, and because it further appears that there is a varience between said proof offered and paragraph IV of plaintiff's complaint in this: That said complaint reads as follows: "Store at Naco." Under the designation of "property" wherein the real estate is set down, "$2340," whereas said exhibit set forth "Store at Naco. Value of improvements, $2340," and from the reading thereof, one is not able to determine whether said amount is real estate or improvements on real
215 estate, or real property or personal property, and that the same is not assessed against or in connection with any said tract or lot of real estate, and that if the same was assessable at all, the same was assessable as personal property, and that the collection of personal property may not be had in this proceeding.

The defendant further objects to that part of said certified copy of said assessment roll offered in evidence, reading as follows: "Description of personal property. Value of personal property. Total valuation. H. H. Furniture, $1200. Library $300.00. Piano, $100.00. Merchandise Naco, $13875.00.

Mr. CLARK: There is no question of the personal property in issue here.

Mr. ELLINWOOD: Upon the trial I have to object to this. It will only take me a minute to get this in. "Merchandise, Bisbee, $7648.00; safe and office furniture, $1500.00; 20 W. horses at $20.00, $400.00. Wagons, etc., $600.00. Harness, etc., $195.00. Lumber and lagging, $11568.00. Hoisting works, etc., $44641.00; smelting works, $112451.00. Mill, mine and smelter supplies and coke and coal, $5073.00. Surveyors' instruments, $125.00. Assaying outfit, $100.00. Cars and car tracks, $6,000.00. Total valuation, $448915.00," because this action was brought under and by virtue of Act 92 of the laws of 1903, being an Act entitled
216 "An Act to amend Chapter 7, Title 62 of the Revised Statutes of Arizona, 1901 entitled 'Collection of delinquent taxes'" and that said action only related to act brought to enforce the payment of taxes found to be due upon real estate, and to enforce the lien of the Territory for taxes unpaid upon any real estate, and had no application to the collection of delinquent or unpaid taxes upon personal property, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

Mr. CLARK: I want to call Your Honor's attention before having this marked, to the fact that the Clerk of the Board of Supervisors, Mr. Berner, has evidently omitted to date the certificate; there is no date of the certification. It is agreed between counsel and myself that Mr. Berner may fix the date of this certificate.

The COURT: What date?

Mr. ELLINWOOD: Any time or any date subsequent to 1901.

Mr. CLARK: To some date that he says that he was in office.

Mr. ELLINWOOD: The same objection. I will have it copied out, so that when the back tax book comes in, and the duplicate assessment roll, I can make the same objection to them. I can
217 modify them and hand them to the stenographer, and save taking the time of the Court.

Mr. CLARK: Certainly.

Mr. CLARK: Now, we would like to have this exhibit marked "Plaintiff's Exhibit B."

Mr. ELLINWOOD: That is admitted subject to the objection.

The COURT: Subject to the objection, and I will have a ruling on it later. The Court will rule upon its admission or rejection afterwards.

Said paper was marked "Exhibit B." and introduced in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT B.

"'55 *Assessment Roll of Cochise County.*

Name of taxpayer.	Lands and city and town property—Description of.	Number of Acres.	Value of lands and town property.	Value of improvements.
Copper Queen Consolidated Mining Co.	Bisbee.			
	67 Patented Mining Claims.			
218	Atlanta, Ace of Spades Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ella Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Hollbrook, Powell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mamoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sunrise, Space, Surprise, Silver Spray, Silver Bear, Sun Rise, Sunny Side, Sacremento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, W-ite Tail Deer, Bisbee, Belle Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia	636	3,180.00	55,431
	Improvements consist of Store Building, Warehouses, Hospital Building, Office and Doctor's Residence and 3 houses No. 48, and 49 and 50, 1st Dist.			
	196 ft. frontage south side of Main St. extending from Copper Jack Mining Claim West End Line in Westerly direction, on which are located Doctor's Office and Library Building	.....	4,960.00	7,800
	20 ft. on North side of Main St. Store No. 6.....	.....	200.00	750
	106 ft. frontage on North side of Main St. extending from Copper Jack Claim, West End Line, in a westerly direction fenced in as Park, and not occupied by any building except 'Fire Hose House'.....	.....	1,060.00	.....
	Supt. Dwelling etc. No. 112, 1st Dist.	.....	1,000.00	2,000
	'The Bessemer' No. 111, 1st Dist.	.....	300.00	3,000
	Lot	26-1000	250.00	.....
	Part of Lot.....	78-1000	750.00	.....
	" " "	57-1000	500.00	10.000
	Store at Naco.....	.....	.....	2,340

219 *Arizona Territory for the Year* 1901.

Description of personal property.	Value of personal property.	Total aluation.
H. H. Furniture	1,200.—	448,915.00
Library	300.—	
Piano	100.—	
Merchandise Naco	13,875.—	
" Bisbee	76,480.—	
Safe and office Furn	1,500.—	
20 W. Horses, a $20.00	400.—	
Wagons, etc	610.—	
Harness etc	195.—	
Lumber and lagging	11,568.—	
Hoisting works, etc	44,641.—	
Smelting works	112,451.—	
Mill and Mine and Smelter Supplies, and Coke and Coal	5,073.—	
Surveyors' instruments	125.—	
Assaying outfit	100.—	
Cars and car track	6,000.—	
		368,139.00
		285,375.00
		533,514.00

I, H. E. Berner, Clerk of the Board of Supervisors of Cochise County, Territory of Arizona, do hereby certify that the above and foregoing is a true and correct copy of the assessment of the Copper Queen Consolidated Mining Company, for the year 1901, as placed on the original roll of said year by the Assessor—pages 55 and 56.

[SEAL.] H. E. BERNER,

Clerk Board of Supervisors, Cochise County, Arizona.

May 5, 1908."

220 Mr. CLARK: I consider it necessary at this point, unless it will be stipulated by counsel, to prove that the assessment roll of Cochise County for the year 1901 was duly delivered by the Assessor of the county to the Clerk of the Board of Supervisors, and that after its delivery it was kept in the office as an open public record, free and open to the public inspection. If that will be admitted, I will not take the trouble to call the Clerk of the Board of Supervisors; if not, I will have to make the record of the original Clerk, and swear Judge Duncan. That all went in before, and if counsel have no objections, I will read the stipulation from the record.

Mr. ELLINWOOD: What is it?

Mr. CLARK: It was not stipulated before; we proved it before. We want to prove that this assessment roll was delivered by the Assessor to the Clerk of the Board of Supervisors, and it was kept by the Clerk of the Board in his office as a public record, and open to the public inspection.

Mr. ELLINWOOD: Well, you had better go ahead and prove it; I haven't it in my mind.

Mr. CLARK: Very well; I will call Mr. Gaines, and tell him to bring up the assessment roll of 1901.

221 J. N. GAINES, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. CLARK:

Q. Mr. Gaines, what is this book which you hold in your hand?
A. This is the duplicate assessment roll of 1901.
Q. Of Cochise County?
A. Of Cochise County, yes sir.
Q. From whom did you receive that?
A. From my predecessor.
Mr. CLARK: That is all; you may stand aside for a moment.

Mr. CLARK: Let me take this. Captain Duncan, will you be sworn?

JAMES F. DUNCAN, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. CLARK:

Q. Captain Duncan, what office, if any, did you hold in the County of Cochise, in the year 1901?
A. I was Clerk of the Board of Supervisors of Cochise County.
222 Q. You may look at this book, and state whether that book was ever in your custody while you were Clerk of the Board of Supervisors for that year? (Hands book to witness.)
A. It was.
Q. What book is it?
A. The assessment roll.
Q. Of Cochise County?
A. Of Cochise County, yes sir.
Q. For the year 1901?
A. 1901.
Q. What number is the volume?
A. Volume 1, A. to L.
Q. Meaning that it contains the names of the tax payers initials run from——
A. "A" to "L."
Q. Inclusively?
A. Inclusively, yes, sir.
Q. Does that contain the assessment of the Copper Queen Consolidated Mining Company for the year 1901?
A. It does.
Q. When did that book come into your possession from the Assessor of the County?
A. I think it was along about the 15th day of June, I can't state the date, 1901, from the Assessor Walter Fife.
Q. Then Assessor of Cochise County?
A. Then Assessor of Cochise County. Well, it was not from him

exactly, but from the party that he had made his deputy to make out the roll.

223 Q. What became of the book, or what did you do with it after it was turned over to you?

A. It was kept in the office for public inspection.

Q. Kept open for public inspection?

A. Yes sir.

Q. You may state whether or not upon receiv- this book, this assessment roll, you gave any notice to the public?

A. I had a notice published in the "Prospector," which was the paper — by the county for publishing county documents of that kind.

Q. I will ask you, Captain Duncan, if, upon receiving that assessment roll you caused this notice to be published in the Tombstone "Prospector," the then official paper of Cochise County?

A. I did.

Q. To-wit: I will read it to you. (Reading.) "Notice to the tax payers of Cochise County. Office of the Board of Supervisors Cochise County, Territory of Arizona. Notice is hereby given that the Assessor of Cochise County has delivered to the Clerk of the Board of Supervisors the assessment roll for 1901, and it is now open for inspection at the office of the Board at the court house in the City of Tombstone. The Board of Supervisors will convene as a Board of Equalization on the first day of July to equalize said assessment roll, and continue in session from time to time as provided by law

224 to and including July 20th, 1901. Dated June 18th, 1901." Signed "James F. Duncan, Clerk." You did publish that notice?

A. I published that notice, yes sir.

Q. For how long, if you remember?

A. Thirty days, I think it was to be.

Q. In a daily paper?

A. Daily paper.

Q. And the official paper of the county?

A. The official paper of the county, yes sir.

Witness excused.

Mr. CLARK: Now, if Your Honor please, we offer a copy of the duplicate assessment roll of Cochise County for the year 1901, in so far as it contains the assessment of the Copper Queen Consolidated Mining Company. This exhibit, at this time—or this offer—is not certified. It is stipulated, however, by counsel that it may be certified by the Clerk now, and may as of this date, and may be considered as a certified copy for the purpose of the present offer, and attached to this is also a copy, which is offered, of the warrant of the Chairman of the Board of Supervisors of Cochise County for the collection of taxes, as required by law. That notice—that warrant, I will read into the record. "To the Tax Collector of the County of Cochise"——

Mr. ELLINWOOD: I want to object when it goes in. My objection

ought to come in first, before you read anything into the record.

225 Mr. CLARK: I will consider that your objection is in.

Mr. ELLINWOOD: I want to make the same objection, which I will have copied and written into the record with additions. In handing the stenographer that copy, it will be changed to meet this condition. There are only one or two additions that I wish to change in the descriptions of these mines. They differ in this from the last exhibit and also from the complaint—"Dididend Wedge", "Ella Coon". I will change that when I make this memorandum when it is given to me. I have the further objection that this duplicate assessment roll contains what is alleged to be the raise on the property and I want to add my additional objections to that at the same time. I will hand that to the stenographer. Let it go in subject to that objection, and also there is a varience between the raise here and the allegations of the complaint, which is charged to be in gross in the complaint. I will hand that in to you. The defendant objects to the introduction of this testimony—the defendant objects to the testimony wherein it recites as follows: "The name of tax payers: Copper Queen Consolidated Mining Company. Lands and City and Town Property, description of: Bisbee. Sixty-five patented mining claims: Atlanta, Ace of Spades, Amazon, Baxter Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ellie
226 Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Hollbrook, Powell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mamoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sunrise, Space, Surprise, Silver Spray, Silver Bear, Sun Rise, Sunny Side, Sacremento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Suprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia. Number of acres, 636. Value of land and town property, $3,180.00. Value of improvements, $55,431.00" for the reason that it appears therefrom that the description of each and all of said several patented mining claims is so vague and indefinite that no valid judgment can be rendered and enforced as a lien against any of said patented mining claims, tracts or lots of land attempted to be described therein.

Because it appears therefrom that sixty-five separate and distinct tracts or parcels of real estate, to-wit: Sixty-five separate and distinct patented mining claims were not separately listed and assessed, but were listed and assessed and set down upon the tax assessment roll of said county as one parcel or tract of land, and thus assessed to the defendant.

227 That said sixty-five patented mining claims, being separate and distinct tracts or parcels of land, were not separately valued, and the amount of taxes on each separately set down and assessed against the same, but that the whole sixty-five mining claims were valued as an entirety and in gross at the sum of $3,180.00.

That no valid judgment can be rendered describing the land, lots and tracts of real estate upon which the taxes are found to be due upon each respectively, and constituting the amount of taxes and interest found to be due upon each of said tracts or parcels of land up to the rendition thereof, and decreeing that the lien of the Territory be enforced against each of such tracts and lots of real estate to the amount of the taxes due thereon.

That it appears therefrom that there has been no legal assessment, levy or return against said sixty-five patented mining claims, and because it appears therefrom that the alleged taxes against said sixty-five patented mining claims, as shown upon said assessment roll, are founded upon proceedings without legal authority, and are wholly nugatory and void.

For the further reason that there is a variance between the attempted description of said sixty-five patented mining claims as set forth in paragraph IV of plaintiff's complaint and the duplicate assessment roll offered in evidence, in this: That the said description contained in said paragraph describes, or attempts to describe
228 a mining claim by the name of "Dividend Wedge", and another by the name of "Ella Coon", and that said exhibit contains three alleged patented mining claims, one described as "Dividend", another by the name of "Wedge" and another by the name of "Ella Coon". That said certified copy of said assessment roll describes one of said mining claims by the title of "Little Joker" and one by the name or designation of "Sunrise", and another by the name of "Sun Rise". That the description of the patented mining claims in paragraph IV does not contain any mining claim by the name of "Little Joker", nor by the name of "Sunrise".

That said certified copy of said assessment roll offered in evidence contains the name of an alleged mining claim by the name of "Belle Isle." That paragraph IV of plaintiff's complaint contains no mining claim by the name of "Belle Isle" but contains a mining claim by the name of "Belle" and "Isle."

The defendant further objects to that part of the assessment roll reading as follows: "Value of improvements, $55,431.00", and the following paragraph "Improvements consist of store building, ware houses, hospital building, office and doctor's residence, and three houses No. 48 and 49 and 50, First District" for the reason that said certified copy of said assessment roll fails to show upon what tracts or lots of real estate, if any, said store building, said ware
229 houses, said hospital building, said office, and said doctor's residence are situate, and because it appears upon the face thereof that the description of the several alleged improvements therein set forth is so vague and uncertain that no valid judgment can be rendered to enforce a lien against any of said tracts or lots of land for the taxes on said alleged improvements. Because it appears therefrom that said store building, said ware houses, said hospital building, said office and said doctor's residence were not separately assessed and listed as improvements upon and against any separate tract or lot of real estate, and were not separately valued,

and the amount of taxes upon each separately set down and assessed against the same, or any said tract or lot of real estate but that the same were valued as an entirety and in gross at the sum of $55,-431.00 without reference to any particular tract or lot of real estate, and because thereof no valid judgment can be rendered for taxes upon said alleged improvements against any tract or lot of real estate, nor can any valid decree be entered declaring a lien to exist in favor of the Territory for the sum of the alleged taxes on said improvements set forth in said duplicate assessment roll against any tract or lot of real estate.

Because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes, other than pretended to be set forth, and because it appears therefrom that the alleged
230 taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

And for the further reason that there is a variance between paragraph IV of plaintiff's complaint and the exhibit offered in evidence, in this: That said complaint recites as follows: "Improvements thereon, consisting of store building, ware houses, hospital building, office and doctor's residence, being assessed at $55,431.00", whereas said exhibit sets forth in the column "Value of improvements, $55,-431.00", and then follows this wording: "Improvements consisting of store building, ware houses, hospital building, office and doctor's residence, and three houses, No. 48 and 49 and 50, First District", without any designation of any kind other than above stated.

For the further reason that it is impossible to tell from the said offer whether the said three houses No. 48 and 49 and 50, First District, were included as a part of the assessment upon, or improvements upon certain alleged mining claims set down as $55,-431.00, or whether the same were included within the subsequent paragraph "198 feet frontage south side of Main Street set down upon said roll as $7,800.00." That there is a variance between the allegations of said paragraph of said complaint, in this: That said description recites in said complaint "three houses, No. 48,
231 49 and 50, First District. 196 feet frontage on South Side of Main Street, in Bisbee, extending from Copper Jack Mining Claim, west end line, in a westerly direction, on which are located docto's office and library building, $4,960.00—$7,800.00," whereas said exhibit sets forth as follows: "Improvements, consisting of store building, ware houses, hospital building, office and doctor's residence, and three houses No 48 and 49 and 50, First District."

"196 feet frontage, south side of Main Street, extending from Copper Jack Mining Claim, west end line, in westerly direction, on which are located doctor's office and library building, $4,960.00, Value of improvements and town property, $7,800.00 Value of improvements," because it appears upon the face thereof that the description of said houses, number 48 and 49 and 50, First District, is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said houses attempted to be described therein.

And for the further reason that said houses, numbered 48 and 49 and 50 are not separately assessed as improvements upon any separate tract or lot of real estate, and are not separately valued, and the amount of taxes on each separately set down and assessed against the same, or against any said tract or lot of real estate, but the same were valued as an entirety, and in gross, without reference to any
232 particular tract or lot of real estate, and because no valid judgment can be rendered upon said houses 48, 49 and 50 against any said tract or lot of real estate, nor can any valid decree be entered, declaring a lien to exist in favor of the Territory for the amount of the alleged taxes on said houses 48, 49 and 50 against any tract or lot of real estate, because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes set forth in said offer.

And for the reason that said real estate described as "196 feet frontage on the south side of Main Street in Bisbee, extending from Copper Jack Mining Claim, west end line in a westerly direction, on which are located doctor's office and library building, is so vague and uncertain that no judgment can be rendered to enforce a lien against any said tract or lot of land attempted to be described therein, and because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes set forth therein, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit reading as follows: "106 feet frontage on north side of Main Street, extending from Copper Jack Mining Claim, west end line, in a
233 westerly direction, fenced in as a park, and not occupied by any building, except 'fire hose house'. Value of land and town property $1,060.00", for the reason that it appears therefrom that said tract or lot of land attempted to be described therein is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot attempted to be described therein, or any said tract or lot of land, and because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes therein set forth, because it appears therefrom that the alleged taxes therein set down are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit offered in evidence, reading as follows: "Suppt. dwelling, etc. No. 112, First District, $1,000.00". Under the head of "land and town property, "$1,000.00. Value of improvements, $2,000.00" for the reason that it appears therefrom that the description, or the attempted description of said tract or lot of land is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot attempted to be described therein, or any said tract or lot of land, and because it appears therefrom that there has been no legal assessment, levy or return of any taxes as set forth in said exhibit,

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and because it appears therefrom that the alleged taxes therein
234 set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

And the defendant further objects to that part of said exhibit reading as follows: "The Bessemer, No. 111, First District. Value of land and town property, $300.00. Value of improvements, $3,000.00", because it appears therefrom that the alleged description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against any tract or lot of land described therein, or any said tract or lot of land, because it appears therefrom that there has been no legal assessment, levy or return of any taxes on said land, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

And the defendant further objects to that part of said certified copy of said duplicate assessment roll offered in evidence, reading as follows: "Number of acres, 26-1000. Value of land and town property, $250.00", for the reason that it appears therefrom that the description in said—or attempted description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate
attempted to be described therein, and for the further reason
235 that there has been no legal assessment, levy or return of the alleged taxes set down upon said roll, and for the further *further* reason that the alleged taxes therein set forth are founded upon proceedings without legal authority and are nugatory and void.

The defendant further objects to that part of said duplicate assessment roll reading as follows: "Part of lot. Number of acres, 78-1000. Value of land and improvements, $750.00", for the reason that it appears therefrom that the attempted description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein, and because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes set forth in said exhibit, because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are nugatory and void.

And defendant objects to that part of said certified copy of said duplicate assessment roll reading as follows: Under the words, "Number of lot", three dittos (" " "), Number of acres, 57-1000 acres. Values of land and town property, $500.00. Value of improvements, $10,000.00", for the reason that it appears therefrom
that said lot *of* tract of land attempted to be described therein
236 is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of land, or any said tract or lot of land because thereof, and because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes set forth therein, because it appears therefrom that the alleged taxes therein set forth *was* without legal authority, and

are wholly nugatory and void, and because there is a varience therein in this: That in said complaint, paragraph IV of said complaint the same is set down in the sum of one thousand dollars, and in said exhibit in the sum of ten thousand dollars.

The defendant objects to that part of said exhibit set forth in said exhibit as follows: "Store at Naco. Value of improvements, $2,340.00", for the reason that it appears therefrom that the description of said real estate, if any is attempted to be described and listed, is so vague and uncertain that no judgment can be rendered for the amount of said alleged taxes against any said tract or lot of real estate, and no valid decree can be entered declaring a lien to exist in favor of the Territory against any said tract or lot of real estate because thereof, and because it appears therefrom that there has been no legal assessment, levy or return of the taxes therein set down, or any said taxes, and because it appears therefrom that the alleged taxes therein sued for are founded upon proceedings without
237 legal authority, and are wholly nugatory and void, and because it further appears that there is a varience between said proof offered, and paragraph IV of plaintiff's complaint, in this: That said complaint reads as follows: "Store at Naco." Under the designation of "property" wherein the real estate is set down, "$2,340", where in said exhibit sets forth "Store at Naco." "Value of improvements, "$2,340", and from the reading thereof, one is not able to determine whether said amount is real estate or improvements on real estate, or real property or personal property, and that the same is not assessed against or in connection with any said tract or lot of real estate, and that if the same was assessable at all, the same was assessable as personal property, and that the collection of personal property may not be had in this proceeding.

The defendant further objects to that part of said certified copy of said duplicate assessment roll offered in evidence, reading as follows: "Description of personal property. Value of personal property. Total valuation. H. H. Furniture, $1,200; Library, $300; Piano, $400; Merchandise, Naco, $13,875.00; Merchandise, Bisbee, $7,648.00; Safe and Office furniture, $1,500.00; 20 W. horses at $20., $400.00; Wagons, etc. $600.00; Harness, etc. $195.00; Lumber and lagging, $11,558.00; Hoisting works, etc. $44,641.00; Smelting
works, $112,451.00; Mill, mine and smelter supplies and
238 coke and coal, $5,073.00; Surveyor's instruments, $125.00; Assaying outfit, $100.00; Cars and car tracks, $6,000.00; Total valuation, $448,915.00," because this action was brought under and by virtue of Act 92 of the laws of 1903, being an Act entitled "An Act *of* Amend Chapter 7, Title 62 of the Revised Statutes of Arizona, 1901, entitled 'Collection of delinquent taxes,' and that said Act only relates to actions brought to enforce the payment of taxes found to be due upon real estate, and to enforce the lien of the territory for taxes unpaid upon any real estate, and has no application to the collection of delinquent or unpaid *unpaid* taxes upon personal property, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

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The defendant further objects to that part of the certified copy of the duplicate assessment roll which reads as follows:

"Raise	
Silver Spray Mine	$1,000,000.
Hoisting works on said mine	50,000
Holbrook Mine	1,000,000
Hoist and imp	10,000.
Copper Queen Mine	50,000.
Copper Jack "	50,000.
Bldgs. & Imps	50,000.
Baxter Mine	250,000.
Atlanta "	250,000.
239 Dividend "	350,000.
Rucker "	200,000.
Mdse. store & Wk's	203,520.
Surveyor's inst	375.
Assaying outfit	600.
Horses	400."

For the reasons that there is a varience between the same and the allegations of the complaint as contained in paragraph VI thereof, which recited that on the 17th day of July 1901, the said Copper Queen Consolidated Mining Company appeared before said Board of Equalization, and that on a hearing and consideration of said matter said Board determined to and did correct the valuations of said property of said Copper Queen Consolidated Mining Company in said assessment roll as returned by said Assessor, by adding thereto the valuation of patented mines, and improvements $33,260,000, in gross; and said complaint alleges that sixty-five separate and distinct patented mining claims were assessed in gross, while the attempted raise of the certain patented mining claims as set forth in said exhibit offered pretends to set forth that said sums were added to separate and individual mines or mining claims; that the said sixty-five patented mining claims never have been assessed separately, and valued separately, and there was not separate assessment of the same, to which the separate raises on said claims could have been
240 added; that the sep-rate raises on said separate mining claims as set forth in said exhibit is wholly nugatory and void, in that said several mining claims attempted to be raised were never assessed separately, nor valued separately as provided by law, and that therefore, there was no separate assessment or valuation to add to or raise; that it appears therefrom that said action of said Board in attempting to add to said pretended original assessment was an attempt to raise property which had never been assessed at any time; because said exhibit offered does not tend to prove any issue in this case; that by reason thereof no valid judgment can be rendered describing the land upon which said taxes are alleged to be enforced as a lien, based upon said alleged equalization, and stating the amount of taxes and interest found to be due on each tract to the rendition thereof, and decreeing that a lien of the Territory be enforced against each of such tracts or lots of real estate to the amount of taxes as equalized, found to be due thereon.

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Mr. CLARK: Now, if Your Honor please, I will proceed with the reading of the tax warrant.

Mr. ELLINWOOD: The Court admits it subject to the objection?

The COURT: Yes, subject to the objection.

Mr. JUDSON: Let it be considered as read.

Mr. CLARK: This authority, which is attached to the ex-
241 hibit, I will read it now. (Reading) "To the Tax Collector of the County of Cochise, Territory of Arizona. You are hereby furnished the duplicate assessment roll in and for Cochise County, Arizona Territory for the year 1901, consisting of two volumes, numbered One and Two, amounting to $240,478.45 total taxes assessed for the year 1901. And you are hereby commanded to collect from each several persons, corporations and companies, estates or other property, whether the owner or owners of which are known or unknown, and named in said foregoing duplicate assessment roll, the several sums opposite their respective names in the last column of each foregoing page marked "Total Tax," on or before the third Monday in December next, retaining in your hands the said several sums so collected and place them to the credit of the several Territorial, County and District funds as required by law.

Attest my hand and the Seal of the Board of Supervisors of Cochise County, Arizona Territory this 17th day of September, 1901.

(Signed) THOS. R. YORK,
Chairman Board of Supervisors,
Cochise County, Arizona Territory."

Mr. CLARK: It is stipulated by counsel that this certificate so read was affixed to the duplicate assessment roll of Cochise County for the year 1901. We ask that subject to the objections, that this be marked as "Plaintiff's Exhibit C."

242 The COURT: Very well.

Said Duplicate Assessment Roll was introduced in evidence, and the same is in the words and figures following, to-wit:

(Here follows Exhibit C, marked pp. 242, 243, and 244.)

EXHIBIT C.

DUPLICATE ASSESSMENT ROLL OF COCHISE COUNTY.

	Name of Tax Payer	REAL ESTATE AND PERSONAL PROPERTY. Description of.	Number of Acres.	Value of Real Estate	Value of Improvements on Real Estate
	Copper Queen Consolidated Mining Co.	**BISBEE.**			
723	210	65 Patented Mining Claims. Atlanta, Ace of Spades Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ella Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Hollbrook, Powell, Harrison, Iron Monster, Little New York, Lookout, Mammouth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton,			
724		Wood Chopper, White Tail Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars & Stripes, South View, Tack, Union, Virginia	636	3180.00	55431
		Improvements consist of store building, ware-			

(Second page)

Duplicate Assessment Roll of Cochise County

Names of Tax Payer	Real Estate and Personal Property.	Number of Acres	Value of Real Estate	Value of Improvements on real estate	Value of Personal property	
	BISBEE.					
	house, Hospital building, office and doctor's residence, and 3 houses, No. 48, 49 and No. 50, 1st. Dist.					
	196 ft. frontage on south side of Main St. extending from Copper Jack Mining Claim, west end line in westerly direction, on which are located Dr's office and library building.....		4960	7800		726
	20 ft. on north side Main St. store No. 6.....		200	750		
	106 ft. frontage on north side Main St. extending from Copper Jack Claim, west end line in a westerly direction fenced in as Park and not occupied by any building except Fire Hose house		1060			
	Sup't dwelling &c. No. 112, 1st Dist.....		1000	2000		
	The Bessmer, No. 111, 1st Dist		300	3000		727
	Lot	26-1000	250			
	Part of lot.....	78-1000	750			
	" " "	57-1000	500	10000		
	Store at Naco.....			2340		
	Furniture				1200	
	Library				300	
	Piano				100	
	Merchandise Naco.....				13875	
	" Bisbee.....				76480	
	Safe and office furniture....				1500	

725

(Second page)

Duplicate Assessment Roll of Cochise County

Names of Tax Payer	Real Estate and Personal Property.	Number of Acres	Value of Real Estate	Value of Improvements on real estate	Value of Personal property
728	20 Word horses				400
	Wagons &c				610
	Harness &c				195
	Lumber and lagging				11568
	Hoisting works &c				44641
	Smelting works				112451
	Mill & Mine and Smelter Supplies and coal and coke				5073
	Surveyors inst. and assaying outfit				225
729	Cars and car track				6000

(Third page)

ARIZONA TERRITORY FOR THE YEAR 1901.

Changes made by County Board of Equalization.

Description of Property.	Amount
Raise.	
Silver Spray Mine,	1,000,000
Hoisting works on said mine,	50,000
Hoolbrook Mine,	1,000,000
Hoist & Imp.	10,000
Copper Queen Mine,	50,000
730 Copper Jack "	50,000
Bld'gs & Imps	50,000
Baxter Mine,	250,000
Atlanta "	250,000
Dividend "	350,000
Rucker "	200,000
Mdse, store & W'hs	203,520
Surveyors' Inst.	375
Assaying outfit,	600
Horses,	400

245 (Fourth Page.)

122,657.09
14,133.12 Paid on account.

$108,523.97 Balance due Dec. 9-01.

Total Valuation.	County Tax.	Territorial Tax.	Total Tax.
3833034	77810.59	44846.50	122657.09

I, J. N. Gaines, Treasurer and ex-officio Tax Collector of Cochise County, Territory of Arizona, do hereby certify that the foregoing description is a true and correct copy of the assessment of the Copper Queen Consolidated Mining Co. for the year 1901, as the same appears in the duplicate assessment rolls of Cochise County on page 506 and 507.

Witness my hand and Seal this 5th day of May A. D. 1908.

[SEAL.] J. N. GAINES,
Treasurer and Tax Collector."

Mr. CLARK: If Your Honor please, I now offer a certified copy of so much of the records of the Board of Supervisors for the year 1901 as sets forth the County and Territorial Tax Rate, and the various purposes for which Territorial and County taxes were levied for that year 1901, in and for Cochise County.

The COURT: Any objection?

246 Mr. CLARK: And ask that it be marked "Plaintiff's Exhibit D."

The COURT: Let it go in.

Mr. ELLINWOOD: No objection.

Said paper was marked "Exhibit D," and was introduced in evidence, and the same is in the words and figures as follows, to-wit:

EXHIBIT D.

TOMBSTONE, ARIZ., *August* 26, 1908.

10 a. m. This being the hour set for meeting of the Board of Supervisors, and Thomas R. York, Chairman of the Board being the only member present, P. J. Delehanty and George B. Reay members of the Board being unavoidably absent, the meeting was postponed until 3 p. m.

3 p. m. Board met pursuant to law and postponement to fix tax rate for the year 1901.

Members present, Thomas R. York, Chairman, P. J. Delahanty and George B. Reay.

Minutes of meeting of August 2, 1901, read and approved.

The Board having completed the additions of the columns of valuation of taxable property in Cochise County Arizona, and having

ascertained the amount to be $7,498,407.43 liable for taxation therein——

247 Now therefore, Be It Resolved, all members voting "aye", that there be, and is hereby levied and ordered to be collected on all taxable property in Cochise County, Arizonaa, $1.17 on each $100.00 valuation thereof for Territorial purposes, and for the following named particular purposes, and in the following proportions, to-wit:

1. Territorial General Fund, Par. 3831, R. S. 1901	$0.35
2. Territorial Insane Asylum Interest Fund, Par. 3615 R. S. 1901	.10
3. Territorial Normaa School Fund, Par. 3702, R. S. 1901	.05
4. Territorial School Fund Par. 2246 R. S. 1901	.03
5. Territorial Reform School Fund, Par. 3762 R. S. 1901	.05
6. University Fund, Par. 3652, R. S. 1901	.06
7. Northern Arizona Normal School Fund, Par. 3718, R. S. 1901	.025
8. Prison Fund, Par. 3601 R. S. 1901	.12
9. Ranger Fund, Par. 3229 R. S. 1901	.05
10. Redemption Fund, Par. 3615 R. S. 1901	.035
11. Capitol Building Fund, Act No. 35, Laws 1901	.035
12. Interest World's Fair Bonds Act 103 Laws 1891	.005
248 13. Capitol Interest Fund Act 9 Laws 1897	.02
14. Territorial Interest Fund R. S. 2047 and Act of Congress 1890	.14
15. Territorial Prison Improvement Fund Act 14 Laws 1901	.035
16. Normaa School of Arizona Dormitory Fund, Par. 3699 R. S. 1901	.02
17. Northern Arizona Normal School Fund Par. 3719 R. S. 1901	.01
18. Insane Asylum Improvement Fund Act 62 Laws 1901	.03
19. University Interest Fund Par. 3663 Laws 1901	.005

making a total of $1.17 on each $100.00 of valuation, all in accordance with the order and levy of the Territorial Board of Equalization now on file in this office for the year 1901.

Resolved, Further, That on the said sum of $7,498,407.43, being the said equalized value of taxable property in said Cochise County, Arizona, there be, and is hereby further levied and ordered to be collected on all taxable property in said county the following rates and for the following purposes on each $100.00 valuation thereof, to-wit:

County General Fund	$1.16
School Fund with the five per cent of total estimate of County School Superintendent included therein	$0.46
249 Road Fund	.03
Interest redemption fund to be applied in payment of the annual interest on $118,000.00 bonded debt of the year 1887 and 1889	.12

Bond redemption fund to be applied in redemption of, $12,000.00 of the County Bonds of 1887, and $7,000.00 of the County Bonds of 1889..... .26

Which amounting to a total of $3.20 for Territorial and County purposes, and which is hereby ordered and declared to be the tax levy of all taxable property in said Cochise County for the year 1901.

At 5 P. M. Board stands at recess to 7 P. M.

I, H. E. Berner, Clerk of the Board of Supervisors of Cochise County, Territory of Arizona, do hereby certify that the foregoing is a true and correct copy of the minutes of the Board of Supervisors of said County and Territory at a meeting held August 26th, 1901, so far as said minutes relate to the fixing of the Territorial and County Tax Rate for the year 1901, exclusive of school district levies.

(Signed) H. E. BERNER,
[SEAL.] *Clerk Board of Supervisors.*"

250 Mr. CLARK: Will it be admitted by counsel that such an order was made as required by law fixing the tax rate?

Mr. ELLINWOOD: Yes.

Mr. CLARK: Very well. It is admitted by counsel that for the year 1901—it is stipulated between counsel that for the year 1901 that the Territorial Board of Equalization duly levied an order, levied the tax rate amounting to $1.17 on each $100.00 of valuation for Territorial purposes to be collected in Cochise County, and upon all of the taxable property in Cochise County, and that said levy is included in the $3.20 levy made by the Board of Supervisors of Cochise County for that year?

Mr. CLARK: We now offer a certified copy of the minutes of the Board of Equalization of Cochise County for the year 1901 under date of July 11th, and following and setting forth the action of the Board of Equalization with reference to the assessment of the Copper Queen Consolidated Mining Company for the year 1901.

Mr. ELLINWOOD: That is two minutes; two meetings. July 11th and July 17. I wish to get an objection in to that. The defendant objects to the introduction of the exhibit in evidence for the reason that there is a varience between the exhibit offered and the plaintiff's complaint, being that part of paragraph VI of said complaint which reads as follows: "Said Board determined from
251 the information then possessed by it that the assessed valuation of certain property of said Copper Queen Consolidated Mining Company, as returned by said Assessor, was too small, and found it necessary to add to said assessed valuation, whereupon said Clerk of said Board, by its direction, gave notice to said Copper Queen Consolidated Mining Company by letter deposited in the post office at Tombstone, in said County, that said Board would, on the 17th day of July 1901, act in said case and upon said matter of increasing said assessment. That on said 17th day of July, 1901 said Copper Queen Consolidated Mining Company appeared before said Board of Equalization, and upon the hearing and consideration

of said matter said Board determined to, and did change and correct the valuations of said property of said Copper Queen Consolidated Mining Company in said assessment roll as returned by said Assessor, by adding thereto, as follows: To the valuation of patented mines and improvements, $3,250,000.00" whereas said certified copy offered in evidence sets forth as follows: "And the Board being now fully advised in the premises, finds it necessary to add to the assessed valuation of the property — Co. on the assessment roll as follows, to-wit: Silver Spray Mine, $1,000,000.00; Hoisting works and improvements on said mine, $50,000; Holbrook Mine, $1,000,000.00;
Hoist and improvements thereon, $10,000.00; Copper Queen
252 Mine, $50,000.00; Copper Jack Mine, $50,000.00; On buildings and other improvements $50,000.00; On Baxter Mine, $250,000.00; On Atlanta Mine, $250,000.00; On Dividend Mine, $350,000.00; On Rucker Mine, $200,000.00; Stock of Mdse. in C. Q. Store and warehouses, $203,520.00; Surveying instruments, $375.00; Assaying outfit $600.00; Horses, $400.00"; That it appears from said complaint that said Board determined to and did correct the valuations on said property of said Copper Queen Consolidated Mining Company in said assessment roll as returned by said Assessor, by adding thereto to the valuation of the patented mines and improvements; That said complaint shows that there was assessed against said Copper Queen Consolidated Mining Company sixty-five patented mines and mining claims in gross, and that the statute provides that the Board of Supervisors may add to or take from the value of assessed property. That said complaint does not show what mining claims were added to or deducted from, if any, but it is alleged in said paragraph that the raise in valuation was upon patented mines, improvements in the sum of $3,260,000.00 without designating any of the particular patented claims. That paragraph IV of said complaint sets forth that sixty-five separate and distinct mining claims were assessed in gross, and it is impossible to tell from the evidence offered what portion was added to on
account of land and what portion was added on account of
253 improvements, or what mining claims, or what the value of each of the respective mining claims were prior to the pretended raise as set forth in the exhibit, and that the pretended raise by the Board of Equalization on the individual or respective mining claims set forth in paragraph VI was wholly nugatory and void in that said several mining claims attempted to be raised were never assessed or valued individually and separately and set down upon the assessment roll, and that therefore there was nothing to add to nor any value to raise, and that it appears therefrom that the action of said Board of Equalization was an effort to add to the original assessment roll, and an attempt to raise the value of property which had never been assessed at any time, and that as there never was a separate and distinct valuation and assessment of said sixty-five mining claims respectively, the Board of Equalization was without authority and jurisdiction to add to or deduct therefrom, and to make the raise as set forth in said exhibit. And for the further reason that it is impossible under the evidence offered to

render a valid judgment describing the land upon which the taxes are sought to be enforced as a lien, based upon said raise and equalization, and stating the amount of taxes and interest found to be due on each tract up to the rendition thereof, and decreeing that the lien of the territory to be enforced against each such tract
254 and lot of real estate to the amount of taxes as raised and equalized, and found to be due thereon.

Mr. CLARK: Is that all the objection?

Mr. ELLINWOOD: Yes.

Mr. CLARK: We now ask that subject to the objection, the minutes of the Board of Equalization just offered be marked "Plaintiff's Exhibit E".

The COURT: Very well; let it be marked.

Said paper was marked "Exhibit E", and introduced in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT E.

"Certified Copy of Minutes of Board of Equalization, 1901.

"TOMBSTONE, ARIZ., *July* 11, 1901.

1 P. M. Board met pursuant to adjournment for recess. Same members present. (All)

Upon motion of Supervisors Geo. B. Reay, the following resolution was unanimously adopted, and the Clerk instructed to give notice therein mentioned.

Resolved.

Office of the Board of Equalization of Cochise County, Arizona.

TOMBSTONE, ARIZ., *July* 11, 1901.

255 In the Matter of the Equalization of the Assessment of the Property of the Copper Queen Consolidated Mining Company.

The Board finding it necessary to add to the assessed valuation of property on the assessment roll, for the year 1901, and it being proposed to increase and add to the valuation of the property on said roll assessed to the Copper Queen Consolidated Mining Company; therefore it is ordered that the Clerk of the Board of Equalization give notice to the said Company in writing that this Board will act in the case of the equalization of the assessment of the property belonging to said company, and the said matter will be heard before the said Board at its office in the Court House of said County in the City of Tombstone, on the 17th day of July, 1901, at the hour of ten o'clock in the forenoon of that day, when and where the said company and all persons interested will be heard.

It is proposed, That the following sums be added to the valuations of the following mentioned property belonging to said Company as the same appears on said assessment roll of said county for the said year 1901, to-wit:

On the Silver Spray Mine	$1,000,000.00
On Hoisting Works and Improvements on said Mine.	75,000.00
On Holbrook Mine	1,000,000.00
256 On Hoist and Improvements thereon	25,000.00
On Copper Queen Mine	50,000.00
On Copper Jack Mine	50,000.00
In Buildings and other improvements	100,000.00
On Baxter	250,000.00
On Atlanta	250,000.00
On Silver Bear	300,000.00
On Dividend	350,000.00
On Rucker	200,000.00
On the stock of merchandise in Copper Queen store and warehouse	323,520.00
On Surveyors' instruments	375.00
On Assaying outfit	900.00
On Horses	400.00
Or a total raise of	$3,975,195.00

By order of the Board this July 11, 1901.

THOS. R. YORK, *Chairman.*

JAMES F. DUNCAN, *Clerk.*

By order of the Board the Clerk is instructed to send the following notice:

'To the Copper Queen Consolidated Mining Company:

Take Notice—That the Board of Equalization of Cochise County, Arizona, will, on July 17th, 1901, at the hour of 10 o'clock in the forenoon of that day take up the matter of the equalization
257 of the assessment of your property situated in said County, and subject to taxation, at its office in the Court House of said County, when and where you and all others interested may be heard.

This notice is given you in accordance with a resolution of said Board this day adopted, and a copy of which is hereby served upon you.

Dated July 11, 1901.

JAMES F. DUNCAN, *Clerk.*'

TOMBSTONE, *July* 17, 1901.

Board met pursuant to adjournment of meeting July 16, 1901 at *P.* A. M.

Members present, Thos. R. York, Chairman, and P. J. Delahanty, and George B. Raey.

Board occupied the time with routine work.

At 12 M. the Board stands at recess to 1 P. M.

At 1 P. M. Board met pursuant to adjournment for recess. Same members present.

Walter Douglas, Agent and Superintendent of the Copper Queen

Consolidated Mining Company, appeared for the Copper Queen Consolidated Mining Company in regard to the assessment of the Lowell and Arizona Copper Smelting and Mining Company, notice
258 having been served on him to appear on the 20th day of July, 1901, in the matter of the raised valuation of the Lowell and Arizona Copper Smelting and Mining Company, asking that the same be heard on this day and waives the right to appear on the 20th, as notified.

The Board granted the request that he be heard.

In the matter of the equalization of the assessment of the properties belonging to the Copper Queen Consolidated Mining Company:

This matter coming on this day regularly to be heard before the Board of Equalization pursuant to a notice heretofore served upon said company in writing, and which notice appears in the minutes of said Board, and in which said notice it was proposed to change and correct the valuation of said Company's property as the same appears upon said Assessment Roll, by adding thereto the sum of $3,464,895.00; for the reason that the sum fixed in said assessment roll appears to be too small; and this being the day and hour fixed in said notice for the hearing, and pursuant to a notice so given Walter Douglas, Superintendent and Agent of said Co. appeared before the Board in behalf of said Co. and made statements regarding said valuations, and his arguments in reference thereto, and the Board being now fully advised in the premises, finds it necessary to add to the assessed valuation of the property of said Co. on the assessment roll as follows, to-wit:

259 Silver Spray Mine	$1,000,000.00
Hoisting works and improvements on said mine	50,000.00
Holbrook Mine	1,000,000.00
Hoist and improvements thereon	10,000.00
Copper Queen Mine	50,000.00
Copper Jack Mine	50,000.00
On buildings and other improvements	50,000.00
On Baxter Mine	250,000.00
On Atlanta Mine	250,000.00
On Dividend Mine	350,000.00
On Rucker Mine	200,000.00
Stock of Mdse. in C. Q. store and warehouses	203,520.00
Surveying instruments	375.00
Assaying outfit	600.00
Horses	400.00
Or a total valuation of	$3,464,895.00

The Clerk is instructed to notify said company in writing of the action of the Board.

TOMBSTONE, ARIZONA, *May* 6, 1908.

I, H. E. Berner, Clerk of the Board of Supervisors of Cochise County, Territory of Arizona, do hereby certify that the within and foregoing is a true and correct copy of the minutes of the Board of Equalization of Cochise County, Territory of Arizona, at
260 meetings held on July 11, 1901 and July 17, 1901, in relation to the raise in valuation of the assessment of the Copper Queen Consolidated Mining Company for the said year 1901.

(Signed) H. E. BERNER,
[SEAL.] *Clerk Board of Supervisors of Cochise County, Arizona.*"

Mr. ELLINWOOD: It goes in subject to the objection?

The COURT: Yes.

Mr. CLARK: Now, I desire to prove, if Your Honor pleases, that on the 11th day of July, 1901, the Clerk of the Board of Supervisors of Cochise County, by direction of the Board, sent out by mail to the Copper Queen Consolidated Mining Company a notice, as follows: "To the Copper Queen Consolidated Mining Company. Take notice that the Board of Equalization of Cochise County, Arizona, will, on the 17th day of July, 1901, at the hour of ten o'clock in the forenoon of that day take up the matter of the equalization of the assessment of your property situate in said county and subject to taxation, at its office in the court house in said county, when and where you and all others interested may be heard. This notice is given to you in accordance with a resolution of said Board this day adopted, and a copy of which is herewith served upon you. Dated July 11, 1901." Signed "James F. Duncan, Clerk. We wish
261 to prove that this notice as read was *dent* to and delivered to the defendant in manner and form as required by law.

Mr. CLARK: We now desire that counsel will admit that the Tax Collector of Cochise County, Arizona, after receiving the duplicate assessment roll of that county for the year 1901 published a notice specifying that the roll was in his possession, and that taxes would be delinquent on and after the third Monday in December, and that this notice was published once a week for four consecutive weeks in the official newspaper of Cochise County.

Mr. ELLINWOOD: Where is that found?

Mr. CLARK: That is found on pages 51 and 52. I will read the notice into the record. It is admitted that this notice was given in the manner and form as required by law—published in the manner and form as required by law in the official paper of Cochise County. "Notice to the tax payers of Cochise County. Notice is hereby given that the——" I have got into something here that I didn't want. I will just say that the notice complied with all the requirements of law. The notice given by the Tax Collector that the duplicate assessment roll had been put in his hands, and that taxes would be delinquent, etc.

Mr. ELLINWOOD: Yes.

Mr. CLARK: If the Court pleases, we now desire to offer in evi-

dence a certified copy of so much of the delinquent assess-
262 ment roll or tax roll of Cochise County, Arizona for the year 1901 as sets forth the delinquent taxes of the Copper Queen Consolidated Mining Company, together with the marginal notes entered thereon by the Clerk of the Board of Supervisors and the District At-orney, by his deputy. I might add that has been excluded as evidence, but it goes in with this because we can't very well exclude it, and attached to which is the affidavit of M. D. Scribner, County Treasurer and ex-officio Tax Collector of Cochise County that the foregoing constitutes the delinquent tax roll of said county for that year which have not been paid, and the amount thereof. Signed "M. D. Scribner," County Treasurer and ex-officio Tax Collector of Cochise County, Arizona. Subscribed and sworn to before me this 31st day of December, A. D. 1901." Signed "A. H. Emanuel, Clerk of the District Court. Seal." And then follows a recapitulation. I don't think that ought to go in. I don't care anything about it. It says "Readjustment," I think that should be detached. That would only serve to confuse. I don't know what that is.

Mr. ELLINWOOD: It shows that the Tax Collector was twenty-seven dollars out.

Mr. CLARK: Let it all go in. We offer this subject to the objection of counsel, with the various papers attached thereto that I have mentioned, as "Plaintiff's Exhibit F."

263 Mr. ELLINWOOD: To which defendant objects, the grounds of which are to be set out in the memorandum. The defendant objects to the introduction of the testimony wherein it recites as follows: "The name of tax payer: Copper Queen Consolidated Mining Company. Lands and city and town property, description of: Bisbee. Sixty-five Patented Mining Claims: Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ella Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Hollbrook, Powell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mamoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sunrise, Space, Surprise, Silver Bear, Silver Spray, Sun Rise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia. Number of acres, 636. Value of land and town property, $3,180.00. Value of improvements, $55,431.00" for the reason that it appears therefrom that the description of each and all of said several patented mining claims is so vague and indefinite that no valid judgment can be rendered
264 and enforced as a lien against any of said patented mining claims, tracts or lots of land attempted to be described therein. Because it appears therefrom that sixty-five separate and distinct tracts or parcels of real etate, to-wit: Sixty-five separate and distinct patented mining claims were not separately listed and assessed, but

were listed and assessed and set down upon the tax assessment roll of said county as one parcel or tract of land, and thus assessed to the defendant.

That said sixty five patented mining claims, being separate and distinct tracts or parcels of land were not separately valued, and the amount of taxes on each separately set down and assessed against the same, but that the whole sixty five mining claims were valued as a entirety, and in gross at the sum of $3,180.00. That no valid judgment can be rendered describing the land, lots and tracts of real estate upon which the taxes are found to be due upon each respectively, and constituting the amount of taxes and interest found to be due upon each of said tracts or parcels of land up to the rendition thereof, and decreeing that the lien of the Territory be enforced against each of such tracts and lots of real estate to the amount of the taxes due thereon.

That it appears therefrom that there has been no legal assessment, levy or return against said sixty-five patented mining claims,
265 and because it appears therefrom that the alleged taxes against said sixty-five patented mining claims as shown upon said assessment roll are founded upon proceedings without legal authority, and are wholly nugatory and void.

For the further reason that there is a variance between the attempted description of said sixty-five patented mining claims as set forth in paragraph IV of plaintiff's complaint, and the delinquent tax roll offered in evidence, in this: That the said description contained in said paragraph describes or attempts to describe a mining claim by the name of "Dividend Wedge", and another by the name of "Ella Coon", and that said exhibit contains three alleged patented mining claims, one described as "Dividend" another by the name of "Wedge", and another by the name of "Ella Coon". That said certified copy of said delinquent tax roll describes one of said mining claims by the title of "Little Joker", and one by the name or designation of "Sunrise", and another by the name of "Sun Rise". That the description of the patented mining claims in paragraph IV does not contain any mining claim by the name of "Little Joker", nor by the name of "Sunrise".

That said certified copy of said delinquent tax roll offered in evidence contains the name of an alleged mining claim by the name of "Belle Isle." That paragraph IV of plaintiff's complaint contains no mining claim by the name of "Belle Isle", but con-
266 tains a mining claim by the name of "Belle", and "Isle".

The defendant further objects to that part of the delinquent tax roll reading as follows: "Value of improvements, $55,431.00". And the following paragraph, "Improvements consist of store building, ware houses, hospital building, office and doctor's residence, and three houses No. 48 and 49 and 50, First District," for the reason that said certified copy of said delinquent tax roll fails to show upon what tracts or lots of real estate, if any, said store building, said ware houses, said hospital building, said office, and said doctor's residence are situate, and because it appears

upon the face thereof that the description of the several alleged improvements therein set forth is so vague and uncertain that no valid judgment can be rendered to enforce a lien against any of said tracts or lots of land for the taxes on said alleged improvements. Because it appears therefrom that said store building, said ware house, said hospital building, said office, and said doctor's residence, were not separately assessed and listed as improvements upon and against any separate tract or lot of real estate, and were not separately valued and the amount of taxes upon each separately set down and assessed against the same, or any said tracts or lot of real estate, but that the same were valued as an entirety, and in gross at the sum of $55,431.00 without reference to any par-
267 ticular tract or lot of real estate, and because thereof no valid judgment can be rendered for taxes upon said alleged improvements against any tract or lot of real estate, nor can any valid decree be entered declaring a lien to exist in favor of the Territory of the amount of the alleged taxes on said improvements set forth in said delinquent tax roll against any tract or lot of real estate. Because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes other than pretended to be set forth and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

And for the further reason that there is a varience between paragrpg IV of plaintiff's complaint and the exhibit offered in evidence, in this: That the said complaint recites as follows: "Improvements there-in, consisting of store building, warehouses, hospital buildings, office and doctor's residence, being assessed at $55,431.00", whereas said exhibit sets forth in the column "Value of improvements, $55,431.00", and then follows this wording, "Improvements consisting of store building, ware houses, hospital building, office, and doctor's residence, and three houses No. 48 and 49 and 50, First District", without any designation of any kind other than above stated.

268 For the further reason that it is impossible to tell from said offer whether the said three houses, No. 48 and 49 and 50, First District, were included as a part of the assessment upon, or improvements upon certain alleged mining claims set down as $55,431.00, or whether the same were included within the subsequent paragraph "190 feet frontage south side of Main Street," set down upon said roll as $7,800.00. That there is a varience between the allegations of said paragraph of said complaint in this: that said description recites in said complaint "Three houses No. 48, 49 and 50, First District. 196 feet frontage on south side of Main Street in Bisbee, extending from Copper Jack Mining Claim, west end line, in a westerly direction, on which are located doctor's office and library building, $4,960.00—$7,800.00" whereas said exhibit sets forth as follows: "Improvements, consisting of store building, ware house, hospital building, office and doctor's residence and three houses, No. 48 and 49 and 50, First District.

196 feet frontage south side of Main Street, extending from Copper Jack Mining Claim, west end line in westerly direction, on which are located doctor's office and library building, $4,960.00. Value of improvements, and town property, $7,800.00. Value of improvements," because it appears upon the face thereof that the description of said houses number- 48 and 49 and
269 50, First District, is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said houses attempted to be described therein. And for the further reason that said houses numbered 48 and 49 and 50 are not separately assessed as improvements upon any separate tract or lot of real estate and are not separately valued, and the amount of taxes on each separately set down and assessed against the same, or against any said tract or lot of real estate, but the same were valued as an entirety and in gross, without reference to any particular tract or lot of real estate, and because no valid judgment can be rendered for taxes upon said houses 48, 49 and 50 against any said tract or lot of real estate, nor can any valid decree be entered declaring a lien to exist in favor of the territory for the amount of the alleged taxes on said houses 48 and 49 and 50 against any tract or lot of real estate, because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes set forth in said offer.

And for the further reason that said real estate described as "196 feet frontage on the south side of Main street in Bisbee, extending from Copper Jack Mining Claim, west end line in a westerly direction on which are located doctor's office and library building", is so vague and uncertain that no judgment can be rendered to enforce a lien against any said tract or lot of land attempted to be
270 described therein, and because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes therein set forth because it appears that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit offered in evidence reading as follows: "20 feet on the North side of Main Street, Store No. 6. Value of land and town property, $200.00. Value of improvements, $750.00," for the reason that it appears therefrom that the description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein, and because it appears therefrom that there is no legal assessment, levy or return of the alleged taxes set forth therein, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit reading as follows: "106 feet frontage on north side of Main Street, extending from Copper Jack Claim, west end line, in a westerly direction, fenced in as a park and not occupied by any building except

'Fire hose house'. Value of land and town property, $1,-
271 060.00", for the reason that it appears therefrom that said tract or lot of land attempted to be described therein is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot attempted to be described therein, or any said tract or lot of land, and because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes therein set forth, because it appears therefrom that the alleged taxes therein set down are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit offered in evidence, reading as follows: "Supt. dwelling, etc. No. 112, First District, $1,000.00". Under the head of "Land and town property, $1,000.00. Value of improvements, $2,000.00", for the reason that it appears therefrom that the description or the attempted description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot attempted to be described therein, or any said tract or lot of land, and because it appears therefrom that there has been no legal assessment, levy or return of any taxes as set forth in said exhibit, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

272 And the defendant further objects to that part of the said exhibit reading as follows: "The Bessemer, No. 111, First District. Value of land and town property, $300.00. Value of improvements, $3,000.00," because it appears therefrom that the alleged description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of land described therein, or any said tract or lot of land, because it appears therefrom that there has been no legal assessment, levy or return of any taxes on said land, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

And the defendant further objects to that part of said certified copy of said delinquent tax roll offered in evidence, reading as follows: "Number of acres, 26-1000. Value of land and town property, $250.00", for the reason that it appears therefrom that the description in said—or attempted description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein, and for the further reason that there has been no legal assessment, levy or return of the alleged taxes set down upon said roll, and for the further reason that the alleged taxes therein set forth are founded upon proceedings without
273 legal authority, and are nugatory and void.

The defendant further objects to that part of said delinquent tax roll reading as follows: "Part of lot. Number of acres, 78-1000. Value of land and improvements, $750.00" for the reason that it appears therefrom that the attempted description of said

tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein, and because it appears upon the face thereof that there has been no legal assessment, levy or return of the alleged taxes set forth in said exhibit, because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are nugatory and void.

And defendant objects to that part of said certified copy of said delinquent tax roll reading as follows: Under the words "Number of lot" (three dittos) " " " . Number of acres, 57-1000 acres. Value of land and town property, $500.00. Value of improvements, $10,000.00", for the reason that it appears therefrom that said lot or tract of land attempted to be described therein is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of land, or any tract or lot of land, because thereof, and because it appears therefrom that there has been
274 no legal assessment, levy or return of the alleged taxes set forth therein, because it appears therefrom that the alleged taxes therein set forth was without legal authority, and are wholly nugatory and void, and because there is a variance therein in this: That in said complaint, paragraph IV of said complaint, the same is set down in the sum of one thousand dollars, and in said exhibit in the sum of ten thousand dollars.

The defendant objects to that part of said exhibit set forth in said exhibit as follows: "Store at Naco. Value of improvements, $2,340.00" for the reason that it appears therefrom that the description of said real estate, if any is attempted to be described and listed is so vague and uncertain that no judgment can be rendered for the amount of said alleged taxes against any said tract or lot of real estate, and no valid decree can be entered declaring a lien to exist in favor of the territory against any said tract or lot of real estate because thereof, and because it appears therefrom that there has been no legal assessment, levy or return, of the taxes therein set down or any said taxes and because it appears therefrom that the alleged taxes therein sued for are founded upon proceedings without legal authority, and are wholly nugatory and void, and because it further appears that there is a variance between said proof offered, and paragraph IV of plaintiff's complaint, in this: That said complaint reads as follows: "Store at Naco". Under the desig-
275 nation of "property" wherein the real estate is set down "$2,340," wherein said exhibit sets forth "Store at Naco. Value of improvements, $2,340.00", and from the reading thereof, one is not able to determine whether said amount is real estate or improvements upon real estate or real property or personal property, and *and* that the same is not assessed against or in connection with any said tract or lot of real estate, and if the same was assessable at all the same was assessable as personal property, and that the collection of personal property may not be had in this proceeding.

The defendant further objects to that part of said certified copy of said delinquent tax roll offered in evidence, reading as follows:

"Description of personal property. Value of personal property. Total valuation. H. H. Furniture, $1200. Library, $300.00. Piano, $100.00. Merchandise, Naco, $13,875.00. Merchandise, Bisbee, $7,648.00. Safe and office furniture, $1,500.00. 20 W. horses at $20. $400.00. Wagons, etc. $600.00. Harness, etc. $195.00. Lumber and lagging, $11,568.00. Hoisting works, etc. $44,641.00. Smelting works, $112,451.00. Mill, mine and smelter supplies, and coke and coal, $5,073.00. Surveyors' instruments, $25.00. Assaying outfit, $100.00. Cars and car tracks, $6,000.00. Total valuation, $448,915.00" because this action was brought under and by virtue of Act 92 of the laws of 1903, being an
276 Act entitled "An Act to amend Chapter 7, Title 62 of the Revised Statutes of Arizona, 1901 entitled 'Collection of delinquent taxes' ", and that said Act only relates to actions brought to enforce the payment of taxes found to be due upon real estate, and to enforce the lien of the Territory for taxes unpaid upon any real estate, and has no application to the collection of delinquent or unpaid taxes upon personal property, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of the certified copy of the delinquent tax roll which reads as follows:

"Raise.

Silver Spray Mine	$1,000,000
Hoisting works on said mine	50,000
Holbrook Mine	1,000,000
Hoist & Imp.	10,000
Copper Queen Mine	50,000
Copper Jack "	50,000
Bldgs. & Imps.	50,000
Baxter Mine	250,000
Atlanta "	250,000
Dividend "	350,000
Rucker "	200,000
Mdse. Store & w'ks	203,520
Surveyors' inst.	375
277 Assaying outfit	600
Horses	400"

For the reasons that there is a varience between the same, and the allegations of the complaint as contained in paragraph VI thereof, which recites that on the 17th day of July, 1901, the said Copper Queen Consolidated Mining Company appeared before said Board of Equalization and upon the hearing and consideration of said matter, said Board determined to and did correct the valuations of said property of said Copper Queen Consolidated Mining Company in said assessment roll as returned by said assessor by adding thereto, the valuation of patented mines and improvements, $3,260,000, in gross; and said complaint alleges that sixty-five separate and distinct

patented mining claims were assessed in gross, while the attempted raise of the certain patented mining claims as set forth in said exhibit offered pretends to set forth that said sums were added to separate and individual mines or mining claims; that the said sixty-five patented mining claims never had been assessed separately, and valued separately, and there was no separate assessment of the same, to which the separate raises on said claims could have been added; that the separate raises on said separate mining claims as set forth in said exhibit is wholly nugatory and void, in that said several mining claims attempted to be raised were never assessed
278 separately nor valued separately as provided by law, and that, therefore, there was no separate assessment or valuation to add to or raise; that it appears therefrom that said action of said Board in attempting to add to *to* said pretended original assessment was an attempt to raise property which had never been assessed at any time; because said exhibit offered does not tend to prove any issue in this case; that by reason thereof, no valid judgment can be rendered describing the land upon which said taxes are sought to be enforced as a lien based upon the said alleged equalization, and stating the amount of taxes and interest found to be due on each tract to the rendition thereof, and decreeing that a lien of the Territory be enforced against each of such tracts or lots of real estate to the amount of taxes as equalized found to be due thereon.

Mr. CLARK: Now, we desire counsel to admit that upon the completion of the delinquent roll of Cochise County——

The COURT: Let the delinquent roll be marked as an exhibit, and go in subject to the objection.

Said paper was marked "Exhibit F," and was read in evidence, and the same is in the words and figures following, to-wit:

(Here follows Exhibit F, marked pages 279 and 280.)

EXHIBIT F.

"DELINQUENT TAX ROLL OF COCHISE

Amount of Taxes for the Fiscal Year Ending December 31, 1901. 833

Name of Tax Payer	DESCRIPTION OF PROPERTY.	Number of Acres	Value of Real Estate	Value of Improvements on Real Estate	
210	**BISBEE.**				
Copper Queen Consolidated Mining Co.	65 Patented Mining Claims. Atlanta, Ace of Spades Amazon Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard Gardner, Hendricks, Hayes, Hollbrook, Powell, Harrison, Iron Monster, Little New York, Lookout, Mammouth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Bell, Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia	636	3180.00	55431	834 835
	Improvements consist of Store Building, Warehouses, Hospital Building, Office and Doctor's Residence and 3 houses No. 48, and 49 and 50, 1st Dist				

Name of Tax Payer	DESCRIPTION OF PROPERTY.	Number of Acres.	Value of Real Estate	Value of Improvements on Real Estate
	196 ft. frontage south side of Main St. extending from Copper Jack Mining Claim West End Line in Westerly direction, on			
836	which are located Doctor's Office and Library Building		4960.00	7800
	20 ft. on North side of Main St. Store No. 6		200.00	750.
	106 ft. frontage on North side of Main St. extending from Copper Jack Claim, West End Line, in a westerly direction fenced in as Park, and not occupied by any building except 'Fire Hose House'		1060.00	
	Supt. Dwelling etc. No. 112, 1st Dist.		1000.00	2000
	'The Bessemer' No. 111, 1st Dist.		300.00	3000
	Lot	26-1000	250.00	
	Part of Lot	78-1000	750.00	
837	" " "	57-1000	500.00	10000
	Store at Naco			2340

	Value personal property
Furniture	1200
Library	300
Piano	100
Mdse. at Naco	13875
" Bisbee	76480
Safe and office furniture	1500
838 20 W Horses	400
Wagons &c	610
Harness &c	195
Lumber & Lagging	11568
Hoisting works &c	44641
Smelting works	112451
Mill & Mine & Smelting supplies & Coke and coal	5073
Surveyors Ints. & Assay outfit	225
Cars & car track	6000

Total value,	3,833.034.
County Taxes,	68,844.97
Teritorial Tax,	39,679
Total Taxes,	108 523.97
Balance due,	108,523.97

281 *Raise by Board of Supervisors.*

Silver Spray Mine	$1,000,000.00
Hoisting works of same mine	50,000.00
Hoolbrook Mine	1,000,000.00
Hoist & Imp.	10,000.00
Copper Queen Mine	50,000.00
Copper Jack "	50,000.00
Bldgs & Imp.	50,000.00
Baxter Mine	250,000.00
Atlanta "	250,000.00
Dividend "	350,000.00
Rucker Mine	200,000.00
Mdse. Store & W. house	203,520.00
Surveyor's Inst.	375.00
Assaying outfit	600.00
Horses	400.00

Paid March 1st, 1902 as per decree of the District Court of this Judicial District the sum of..... $9,132.64
and 5 per cent int. added thereto a-c of delinquency... 456.63

Total amount paid $9,589.27

by check No. 24564 dated Feby. 28th, 1902, and signed S. W. French, Asst. Supt. and to the Treas. of the C. Q. C. M. Co. 99 John St. New York.

282 This matter compromised by B. of S., see their order of June 8, 1904 signed J. N. Gaines, Clerk Board of Supervisors, approved by the office of District Attorney, signed D. L. Cunningham, District Attorney, by Fred A. Sutter, Deputy District Attorney.

Dec. 9th, 1901,	$122,657.09	Am't of Taxes,
	$14,133.12	Pd. *of* account.
	$108,523.97	Balance due,
March 1, 1902	$9,132.64	
	$99,391.33	Balance of original delinquency

Attached to said exhibit F, was the following words and figures, to-wit:

"TERRITORY OF ARIZONA,
Cochise County, ss:

M. D. Scribner, County Treasurer and ex-officio Tax Collector of Cochise County, Arizona, being first duly sworn upon his oath says, that the foregoing constitutes the delinquent list of said county *going constitutes the delinquent list of said county* for the year 1901, being a true list of all persons and property owing
283 taxes in said county for the year, which have not been paid, and the amount thereof. Further affiant saith not.

(Signed) M. D. SCRIBNER,
County Treasurer and ex-officio Tax Collector for Cochise County, Territory of Arizona.

Subscribed and sworn to before me this 31st day of December A. D. 1901.

(Signed) E. H. EMANUEL,
[SEAL.] *Clerk District Court.*

Tax Roll	240,478.45
Added by Treas'r & paid	917.35
" delinquent	27.81
	241,423.61

Taxes collected by Treas'r	109,600.87	
Delinquent taxes	128,970.65	
Taxes collected by assessor	1,089.16	
Difference bet. am't ch'd on rolls and the am't p'd to assessor	12.45	
Widowos' exemption	848.83	
284		
Collected order B. of S. and Acc't of	901.65	Double assessment
	241,423.61	

Readjustment of the Assessment Rolls for the Year 1901.

	Dr.	Cr.
To amount of original rolls (Duplicate Rolls)	240,478.45	
To add. error page 55	33.60	
" " " " 278	10.00	
" added to original roll by Treasurer	240,522.05	
" added to original roll by Treasurer and collected by him	634.31	
" Difference in adjustment not found	27.87	
	241,184.23	

Contra.

By cash collected by Treasurer as per cash book	109,600.87
" Delinquent list, revised	128,573.51
" Double assessments	129.12
" Widows exempt from taxation under the law	880.35
285	
" Amount charged on rolls to assessor	1,101.01
" Cancelled by order B. of S	899.37
	241,184.23

TOMBSTONE, A. T., *July* 30, 1904.

This is to certify that I have readjusted the duplicate assessment rolls for 1901, and have made a perfect balance with the exception of $27.87 as shown above not found.

(Signed) ROB'T C. KETTLEWELL.

Mr. CLARK: Now, we desire counsel to admit that upon the completion of the delinquent roll of Cochise County, the following notice was duly published by the Treasurer and Ex-Officio Tax Collector of Cochise County in the Tombstone Prospector, the official paper of that county commencing with Monday, September 23rd, 1901, and continuing each and every day for four consecutive weeks.

Mr. ELLINWOOD: It will be admitted.

Mr. CLARK: I will read the notice. (Reading.) "Notice to the tax payers of Cochise County, Arizona. Notice is hereby given that the delinquent assessment roll of the county of Cochise is now in my possession for the collection of the taxes for—levied for the year 1901 in said county. Taxes will become delinquent——" I am not going to offer that.

286 Mr. ELLINWOOD: Just offer that it was published?

Mr. CLARK: We offer—it is agreed between the counsel that upon the receipt of the delinquent roll by the Tax Collector of Cochise County, that he published in the official newspaper of that county the notice as required by law.

At this point in said hearing, a recess of ten minutes was taken by the Court.

Mr. CLARK: Now, may it please Your Honor, we desire to offer in evidence a certified copy of so much of the Back Tax Book of Cochise County for the year 1901 as sets forth the back taxes of the Copper Queen Consolidated Mining Company for that year.

Mr. ELLINWOOD: To which the defendant objects for the following reasons: The defendant objects to the testimony wherein it recites as follows: "The name of tax payer: Copper Queen Consolidated Mining Company. Landis and city and town property, description of: Bisbee. Sixty-five patented mining claims: Atlanta, Ace of Spades, Amazon, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Hollbrook,
287 Powell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammouth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sunrise, Space, Surprise Silver Spray, Silver Bear, Sun Rise, Sunny Side, Sacremento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia. Number of acres, 636. Value of land and town property $3,180.00. Value of improvements, $55,431.00" for the reason that it appears therefrom that the descriptions of each and all of said several mining claims

is so vague and indefinite that no valid judgment can be rendered and enforced as a lien against — of said patented mining claims, tracts or lots of land attempted to be described therein.

Because it appears therefrom that sixty-five separate and distinct tracts or parcels of real estate, to-wit: Sixty-five separate and distinct patented mining claims were not separately listed and assessed, but were listed and assessed and set down upon the Back Tax Book of said county as one parcel or tract of land, and thus assessed to the defendant.

That said sixty-five patented mining claims being separate and distinct tracts or parcels of lands were not separately valued,
288 and the amount of taxes on each separately set down and assessed against the same, but that the whole sixty-five mining claims were valued as an entirety and in gross at the sum of $3,180.00. That no valid judgment can be rendered describing the land, lots and tracts of real estate upon which the taxes are found to be due upon each respectively, and constituting the amount of taxes and interest found to be due upon each of said tracts or parcels of land up to the rendition thereof, and decreeing that the lien of the Territory be enforced against each of said tracts and lots of real estate to the amount of the taxes due thereon.

That it appears therefrom that there has been no legal assessment, levy or return against said sixty-five patented mining claims, and because it appears therefrom that the alleged taxes against said sixty-five patented mining claims as shown upon said Back Tax Book are founded upon proceedings without legal authority, and are wholly nugatory and void.

For the further reason that there is a variance between the attempted description of said sixty-five patented mining claims as set forth in paragraph IV of plaintiff's complaint, and the Back Tax Book offered in evidence in this: That the said description contained in said paragraph describes, or attempts to describe a mining claim by the name of "Dividend Wedge," and another by the name
289 of "Ella Coon," and that said exhibit contains three alleged patented mining claims, one described as "Dividend," another by the name of "Wedge" and another by the name of "Ella Coon." That said certified copy of said Back Tax Book describes one of said mining claims by the title of "Little Joker" and one by the name or designation of "Sunrise," and another by the name of "Sun Rise." That the description of the patented mining claims in paragraph IV does not contain any mining claim by the name of "Little Joker," nor by the name of "Sunrise."

That said certified copy of said Back Tax Book offered in evidence contains the name of an alleged mining claim by the name of "Belle Isle." That paragraph IV of plaintiff's complaint contains no mining claim by the name of "Belle Isle," but contains a mining claim by the name of "Belle" and "Isle."

The defendant further objects to that part of the Back Tax Book reading as follows: "Value of improvements, $55,431.00," and the following paragraph "Improvements, consist of store building, warehouses, hospital building, office and doctor's residence, and three

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houses No. 48 and 49 and 50, First District," for the reason that said certified copy of said Back Tax Book fails to show upon what tracts or lots of real estate, if any, said store building, said ware
290 houses, said hospital building, said office, and said doctor's residence are situate, and because it appears upon the face thereof that the description of the several alleged improvements therein set forth is so vague and uncertain that no valid judgment can be rendered to enforce a lien against any of said tracts or lots of land for the taxes on said alleged improvements. Because it appears therefrom that said store building, said ware house, said hospital building, said office and said doctor's residence were not separate assessed and listed as improvements upon and against any separate tract or lot of real estate, and were not separately valued, and the amount of taxes upon each separately set down and assessed against the same, or any said tract or lot of real estate, but that the same were valued as an entirety and in gross at the sum of $55,431.00 without reference to any particular tract or real estate, and because thereof no valid judgment can be rendered for taxes upon said alleged improvements against any tract or lot of real estate, nor can any valid decree be entered declaring a lien to exist in favor of the Territory for the amount of the alleged taxes on said improvements set forth in said Back Tax Book against any tract or lot of real estate. Because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes other than pretended to be set forth, and because it appears therefrom that
291 the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

And for the further reason that there is a variance between paragraph IV of plaintiff's complaint and the exhibit offered in evidence, in this: That said complaint recites as follows: "Improvements thereon, consisting of store building, ware houses, hospital building, office and doctor's residence, being assessed at $55,431.00," whereas said exhibit sets forth in the column "Value of improvements, $55,431.00," and then follows this wording: "Improvements consisting of store building, ware houses, hospital building, office and doctor's residence, and three houses, No. 48 and 49 and 50, First District," without any designation of any kind other than above stated.

For the further reason that it is impossible to tell from the said offer whether the said three houses No. 48 and 49 and 50, First District, were included as a part of the assessment upon, or improvements upon certain alleged mining claims set down as $55,431.00, or whether the same were included within the subsequent paragraph "196 feet frontage south side of Main Street set down upon said roll as $7,800.00." That there is a variance between the allegations of said paragraph of said complaint, in this: That said description recites in said complaint "three houses, No. 48, 49 and 50,
292 First District. 196 feet frontage on South Side of Main Street, in Bisbee, extending from Copper Jack Mining Claim, west end line, in a westerly direction, on which are located doctor's office and library building, $4,960.00—$7,800.00," whereas said ex-

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hibit sets forth as follows: "Improvements, consisting of store building, ware houses, hospital building, office and doctor's residence, and three houses, No. 48 and 48 and 50, First District.

196 feet frontage, south side of Main Street, extending from Copper Jack Mining Claim, west end line, in westerly direction, on which are located doctor's office and library building, $4,960.00. Value of improvements and town property, $7,800.00. Value of improvements," because it appears upon the face thereof that the description of said houses number 48 and 49 and 50 First District is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said houses attempted to be described therein, and for the further reason that said houses numbered 48 and 49 and 50 are not separately assessed as improvements upon any separate tract or lot of real estate, and are not separately valued, and the amount of taxes on each separately set down and assessed against the same, or against any said tract or lot of real estate, but the same were valued as an entirety, and in gross without reference to any particular tract or lot of real estate, and because no valid judgment can be rendered for
293 taxes upon said houses 48, 49 and 50 against any said tract or lot of real estate, nor can any valid decree be entered declaring a lien to exist in favor of the Territory for the amount of the alleged taxes on said houses 48, 49 and 50 against any tract or lot of real estate, because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes set forth in said offer.

And for the further reason that said real estate described as "196 feet frontage on the south side of Main Street in Bisbee, extending from Copper Jack Mining Claim, west end line, in a westerly direction, on which are located doctor's office and library building, is so vague and uncertain that no judgment can be rendered to enforce a lien against any said tract or lot of land attempted to be described therein, and because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes therein set forth, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit in evidence reading as follows: "20 feet on the north side of Main Street. Store No. 6. Value of land and town property, $200.00. Value of improvements, $750.00," for the reason that it appears therefrom that the description of said tract or lot of real estate is so
294 vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein, and because it appears therefrom that there is no legal assessment, levy or return of the alleged taxes set forth therein, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit reading as follows: "106 feet frontage on north side of Main Street, extending from Copper Jack Claim, west end line, in a westerly direction,

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fenced in as a park and not occupied by any building, except 'fire hose house.' Value of the land and town property $1,060.00," for the reason that it appears therefrom that said tract or lot of land attempted to be described therein is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot attempted to be described therein, or any said tract or lot of land, and because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes therein set forth, because it appears therefrom that the alleged taxes therein set down are founded upon proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of said exhibit
295 offered in evidence, reading as follows: "Supt. dwelling, etc. No. 112. First District. $1,000.00." Under the head of "land and town property, "$1,000.00. Value of improvements, $2,-000,00" for the reason that it appears therefrom that the description, or the attempted description of said tract or lot of land is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot attempted to be described therein, or any said tract or lot of land, and because it appears therefrom that there has been no legal assessment, levy or return of any taxes as set forth in said exhibit, and because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority and are wholly nugatory and void.

And the defendant further objects to that part of said exhibit reading as follows: "The Bessemer, No. 111, First District. Value of land and town property, $300.00. Value of improvements, $3,-000.00", because it appears therefrom that the alleged description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of land described therein, or any said tract or lot of land, because it appears therefrom that there has been no legal assessment, levy or return of any taxes on said land, and because it appears
296 therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are wholly nugatory and void.

And the defendant further objects to that part of said certified copy of said Back Tax Book offered in evidence, reading as follows: "Number of acres, 26-1000. Value of land and town property, $250.00", for the reason that it appears therefrom that the description in said—or attempted description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein, and for the further reason that there has been no legal assessment, levy or return of the alleged taxes set down upon said Back Tax Book, and for the further *further* reason that the alleged taxes therein set forth are founded upon proceedings without legal authority and are nugatory and void.

The defendant further objects to that part of said Back Tax Book reading as follows: "Part of lot, Number of acres, 78-1000. Value of land and improvements, $750.00", for the reason that it appears

therefrom that the attempted description of said tract or lot of real estate is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of real estate attempted to be described therein, and because it appears upon the face
297 thereof that there has been no legal assessment, levy or return of the alleged taxes set forth in said exhibit, because it appears therefrom that the alleged taxes therein set forth are founded upon proceedings without legal authority, and are nugatory and void.

And defendant objects to that part of said certified copy of said Back Tax Book reading as follows: Under the words, "Number of lot," three dittos (" " "), Number of acres, 57-1000 acres. Values of land and town property, $500.00. Value of improvements, $10,000.00," for the reason that it appears therefrom that said lot or tract of land attempted to be described therein is so vague and uncertain that no valid judgment can be rendered to enforce a lien against said tract or lot of land, or any tract or lot of land because thereof, and because it appears therefrom that there has been no legal assessment, levy or return of the alleged taxes set forth therein, because it appears therefrom that the alleged taxes therein set forth was without legal authority, and are wholly nugatory and void, and because there is a variance therein in this: That in said complaint, paragraph IV of said complaint the same is set down in the sum of one thousand dollars, and in said exhibit in the sum of ten thousand dollars.

The defendant objects to that part of said exhibit set forth in said exhibit as follows: "Store at Naco. Value of improve-
298 ments, $2,340.00," for the reason that it appears therefrom that the description of said real estate, if any is attempted to be described and listed, is so vague and uncertain that no judgment can be rendered for the amount of said alleged taxes against any said tract or lot of real estate, and no valid decree can be entered declaring a lien to exist in favor of the Territory against any said tract or lot of real estate because thereof, and because it appears therefrom that there has been no legal assessment, levy or return of the taxes therein set down, or any said taxes, and because it appears therefrom that the alleged taxes therein sued for are founded upon proceedings without legal authority, and are wholly nugatory and void, and because it further appears that there is a variance between said proof offered, and paragraph IV of plaintiff's complaint, in this: That said complaint reads as follows: "Store at Naco." Under the designation of "property" wherein the real estate is set down, "$2,340," whereas said exhibit sets forth "Store at Naco." "Value of improvements, $2,340.00," and from the reading thereof, one is not able to determine whether said amount is real estate or improvements on real estate, or real property or personal property, and that the same is not assessed in connection with or against any said tract or lot of real estate, and that if the same was assessable at all, the same was accessable as personal property, and that the
299 collection of personal property may not be had in this proceeding.

The defendant further objects to that part of said certified copy of said Back Tax Book offered in evidence, reading as follows: "Description of personal property. Value of personal property. Total valuation. H. H. Furniture, $1,200; Library, $300; Piano, $100; Merchandise, Naco, $13,875.00; Merchandise, Bisbee, $7,648.00; Safe and Office furniture, $1,500.00; 20 W. horses at $20., $400.00; Wagons, etc. $600.00; Harness, etc., $195.00; Lumber and lagging, $11,568.00; Hoisting works, etc., $44,641.00; Smelting works, $112,451.00; Mill, mine and smelter supplies and coke and coal, $5,075.00; Supervisor's instruments, $125.00; Assaying outfit, $100.00; Cars and car tracks, $6,000.00; Total valuation, $448,915.00," because this action was brought under and by virtue of Act 92 of the laws of 1903, being an Act entitled "An Act to Amend Chapter 7, Title 62 of the Revised Statutes of Arizona, 1901, entitled 'Collection of delinquent taxes,' and that said Act only relates to actions brought to enforce the payment of taxes found to be due upon real estate, and to enforce the lien of the territory for taxes unpaid upon any real estate, and has no application to the collection of delinquent or unpaid taxes upon personal property, and because it appears therefrom that the alleged taxes therein set forth are founded upon
300 proceedings without legal authority, and are wholly nugatory and void.

The defendant further objects to that part of the certified copy of the Back Tax Book, which reads as follows:

"Raise

Silver Spray Mine	$1,000,000.
Hoisting works on said mine	50,000
Holbrook Mine	1,000,000.
Hoist and imp	10,000.
Copper Queen Mine	50,000.
Copper Jack "	50,000.
Bldgs. & Imps	50,000.
Baxter Mine	250,000.
Atlanta "	250,000.
Dividend "	350,000.
Rucker "	200,000.
Mdse. store & Wk's	203,520.
Surveyors' inst	375.
Assaying outfit	600.
Horses	400."

For the reasons that there is a variance between the same and the allegations of the complaint as contained in paragraph VI thereof, which recited that on the 17th day of July 1901, the said Copper Queen Consolidated Mining Company appeared before said Board of Equalization, and that on a hearing and consideration of said matter said Board determined to and did correct the valua-
301 tions of said property of said Copper Queen Consolidated Mining Company in said assessment roll as returned by said

Assessor, by adding thereto the valuation of patented mines, and improvements $3,260,000, in gross; and said complaint alleges that sixty-five separate and distinct patented mining claims were assessed in gross, while the attempted raise of the certain patented mining claims as set forth in said exhibit offered pretends to set forth that said sums were added to separate and individual mines or mining claims; that the said sixty-five patented mining claims never have been assessed separately, and there was no separate assessment of the same, to which the separate raises on said claim could have been added; that the separate raises on the separate mining claims as set forth in said exhibit *is* wholly nugatory and void, in that said several mining claims attempted to be raised were never assessed separately, nor valued separately as provided by law, and that therefore, there was no separate assessment or valuation to add to or raise; that it appears therefrom that said action of said Board in attempting to add to said pretended original assessment was an attempt to raise property which had never been assessed at any time; because said exhibit offered does not tend to prove any issue in this cause; that by reason thereof no valid judgment can be rendered describing the
302 land upon which said taxes are sought to be enforced as a lien, based upon said alleged equalization, and stating the amount of taxes and interest found to be due on each tract to the rendition thereof, and decreeing that a lien of the Territory be enforced against each of such tracts or lots of real estate to the amount of taxes as equalized, found to be due thereon.

The COURT: It will go in subject to the objection.

Mr. CLARK: We will ask that the stenographer mark it "Plaintiff's Exhibit G."

Said Back Tax Book was marked "Exhibit G," and was read in evidence, and is in the words and figures following, to-wit:

(Here follows Exhibit G, marked pp. 303, 304, and 305.)

EXHIBIT G.

67-68 *Back Tax Book of Cochise County.*

Name of taxpayer, C.	Description of property.	Acres.	Real estate.	Improvements.
Copper Queen Con. Min. Co., 1901	Bisbee — 65 Patented Mining Claims, Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper Jack, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Hollbrook, Powell, Harrison,			

Name of Tax Payer C.	DESCRIPTION OF PROPERTY.	Acres.	Real Estate	Improvements	
	Iron Monster, Little New York, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Surprise, Space, Silver Spray, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, (Continued page 68) Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia	636	3180.00	55431	905
	Improvements consist of store building, ware house, hospital Bldg. office and Dr's residence and three houses, 48, 49 and 50				906
	196 ft frontage on south side of Main Street extending from Copper Jack Mining Claim, west end line, in westerly direction, on which are located Dr's office and Library Bldg,...		4960.00	7800	
	20 ft on North Side Main St. Store 6		200.00	750.	
	106 ft frontage on North side Main St. extending from Copper Jack Claim west end line in a westerly direction, fenced in as park, and not occupied by any building except 'Fire Hose House'		1060.00		
	Sup't dwelling &c 112 1st Dist		1000.00	2000	
	The Besmer 111 " "		300.00	3000	907
	Lot	26-1000	250.00		
	Part of lot	78-1000	50.00		
	" " "	57-1000	500.00	10000	
	Store at Naco			2340	
	Furniture			1200	
	Library			300	
	Piano			100	
	Mdse at Naco			13875	
	" " Bisbee			76480	

Name of Tax Payer C.	DESCRIPTION OF PROPERTY.	Acres.	Real Estate	Improvements
	Safe and office furniture			1500
	20 work horses			400
908	Wagons &c			610
	(Continued on p 69)			
	Horses &c.			195
	Lumber & lagging			11568
	Hoisting works &c			44641
	Smelting works			112451
	Mill & mine & smelter supplies and coke and coal			5073
	Surveyors instruments & assay outfit			225
	Cars & car track			6000
			Total valuation all property	3833034

(Following page)

Raise by B. of S.

909

Silver Spray Mine,	$1,000,000.00
Hoisting works on same mine,	50,000.00
Hollbrook mine,	1,000,000.00
Hoist & imp.	10,000.00
Copper Queen mine,	50,000.00
Copper Jack "	50,000.00
Bldgs & Imp.	50 000.00
Baxter mine,	250,000.00
Atlanta "	250,000.00
Dividend "	350,000.00
Rucker "	20,000.00
Mdse. store & warehouse,	203,520.00
Surveyors Inst.	375.00
Assaying outfit,	600.00
Horses,	400.00

910

Amount of taxes,	122,657.09
Dec. 9, 1901, paid on acct.	14,133.12
	108,523.97
Mar. 1st, 1902, paid,	9,132.64
Original delinquency,	99,391.33

This matter compromised by B. of S. See their order of June 8, 1904 signed by J. N. Gaines, Clerk Board of Supervisors. Approved by office of District Attorney, signed D. L. Cunningham Dist. Attorney by Fred A. Sutter, Deputy District Attorney.

Ter. Taxes.....	Co. Taxes.....	Total	Interest to Oct 1 1903 time making back tax book	Clerks fees.....	Aggregate tax, Interest & Cerks fees.....
44846.50	7788059	122657.09			
Am't p'd on acc't		23265.76			
Balancedue		99391.33	17393.48	17.00	116801.81

Int. for 1 yr, 9 mos., should be 1 yr 10 mos, $18,221.74

911

Tombstone, Ariz., March 6, 1908.

912

I, J. N. Gaines, Treasurer and ex-officio Tax Collector, do hereby certify that the foregoing lists are true copies of Back Tax Book, Delinquent Tax Roll, Duplicate Assessment Roll, Affidavit and Warrant signed by Chairman of the Board of Supervisors in Duplicate Assessment Roll, all for the year A. D. 1901, in relation to Copper Queen Cons. Mng. Co. Assessment for said year.

913

J. N. GAINES,
Treasurer and ex-officio Tax Collector.

(Seal) By THOS. A. SMITH,
Deputy.

306 I hereby verify the above signature of J. N. Gaines, Treasurer and Tax Collector of Cochise County, Arizona.

[SEAL.] H. E. BERNER,
Clerk Board of Supervisors.

Mr. CLARK: If Your Honor please, we shall offer in evidence certified copies of the patents from the United States to the Copper Queen Consolidated Mining Company, or its grantors, of the several patented mines or claims mentioned in the complaint and in the exhibit to the complaint, and as set forth also in the list, or the Assessment list given in by the defendant to the Assessor of Cochise County for the year 1901 with one exception. I see a variance in the name. We speak of one name as the "Little Joker". That should have — called *that* -he "Little Jack", and I ask permission of the Court to also offer certified copy of that claim.

The COURT: What is the difference?

Mr. CLARK: From the "Little Joker" to the "Little Jack", I don't know which it is, but there seems to be a variance. We do not seem to find any claim of record known as the "Little Joker", but there does seem to be one by the name of "Little Jack", and there seems to be an error there in getting the name in the record.

307 The COURT: I don't believe I find any "Little Joker" here in the complaint.

Mr. CLARK: I find the assessment list, the "Little Joker" patented claim.

The COURT: I have the Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Lookout, Mammouth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Harrscrabble Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union and Virginia.

Mr. CLARK: May I not ask Your Honor if the "Little Joker" is listed in Exhibit A to the complaint?

The COURT: I will see in just a moment. It is not listed in paragraph IV.

Mr. CLARK: I say in Exhibit A to the complaint?

308 Mr. ELLINWOOD: When that comes up, we will have serious objections to the certified copies.

The COURT: I have the "Look Out", and I have the "Lucky Jack".

Mr. CLARK: Well, it might be the "Lucky Jack", I am not able to say; "Little Joker" or something of that kind. The defendant gives it in as the "Little Joker", the defendant himself; the defendants gives it in as the "Little Joker."

The COURT: The defendants gives in one mine as the "Little Joker"?

Mr. CLARK: Yes.

The COURT: There is no "Little Joker" in this, but there is a "Lucky Jack" in this list attached to this exhibit.

Mr. CLARK: We will congratulate ourselves that the complaint is free from jokers of this kind.

Mr. JUDSON: It indicates that it is a necessary incident of this method of creating liens.

Mr. CLARK: Our whole complaint is purged with that, so you can't complain.

Mr. CLARK: At any rate, we offer certified copies of all of the mining claims mentioned in the complaint and in the exhibit attached thereto, and in the list, or assessment list as rendered to the assessor of Cochise County in 1901 by the defendant.

309 I shall have to offer this, and ask the indulgence of the Court to supply them at the earliest possible moment, and in lieu of these, I offer the record.

Mr. ELLINWOOD: I have a very serious objection. I want to examine them, and when they are here, physically in Court, I want to enter objections of record; I think it is just as material as anything in this case; it goes to the very bottom of the case.

The COURT: Perhaps you might defer that offer until morning, and have them here.

Mr. CLARK: Well, in the morning we will have either the certified copies or the original records, one or the other, so that this will be brought up before the Court.

The COURT: Yes.

Mr. CLARK: We will recall Captain Duncan for just a moment.

JAMES F. DUNCAN, being recalled as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. CLARK:

Q. Now, Captain Duncan——

Mr. CLARK: I will simply state that I desire to prove by the witness, who was Clerk of the Board of Supervisors in 1901,

310 that he made an abstract of the Assessment Roll in accordance with the requirements of law, and forwarded that abstract to the Territorial Auditor. If that will be admitted, I won't ask the witness one question.

Mr. ELLINWOOD: I will object to the testimony of the witness that he made and he sent an abstract to the Territorial Auditor, unless he has the abstract to show what it was. This witness' statement of the abstract would not prove that fact. Under ordinary circumstances, I would admit anything that Colonel Duncan says.

Mr. CLARK: I will submit a copy and see.

Mr. ELLINWOOD: No objection; you can read that in.

Mr. CLARK: I will file it as an exhibit. Mark it as an exhibit.

Mr. ELLINWOOD: It is admitted that Colonel Duncan made out that abstract, and sent it to the Auditor of the Territory.

Mr. CLARK: It is admitted that the Clerk of the Board of Super-

visors of Cochise County, in the year 1901, James F. Duncan, made out an abstract of the Assessment Roll in the manner and form as required by law and at the time required by law, and forwarded the same to the Territorial Auditor, and that a copy of this abstract is now offered in evidence by the plaintiff to be marked "Plaintiff's Exhibit H".

311 The COURT: No objection.

Mr. ELLINWOOD: No objection.

The COURT: Let it be marked.

Said paper was marked "Exhibit H," and was introduced in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT "H."

"Copy. Copy.

Office of the Board of Supervisors, Cochise County, Arizona.

TOMBSTONE, ARIZ., *Aug.* 6, 1901.

To the Territorial Board of Equalization:

Below find abstract of the Assessment Roll of Cochise County for the year 1901.

312 Description of property.

Description of property.	Number.	Value.	Value improvements.	Total value.
Cultivated Land, acres	43372	76,011.	73,587.	149,598.
Uncultivated Land, acres				
Railroad Land, acres				
Land Grants, acres	47000	85,000.		85,000.
Patented Mines, number of mines	322	367,831.	227,701.	3,904,532.
Improvements on Patented Mines				
Improvements on Unpatented Mines				
Town and City Lots	922	29,956.	535,688.	565,644.
Horses, Range	1610	17,040.		17,040.
Horses, work	906	30,196.		30,196.
Horses, saddle	1212	23,914.		23,914.
Horses, stallions	18	1,000.		1,000.
Mules	209	5,587.		5,587.
Asses	110	533.		533.
Cattle, Range and stock	55894	558,940.		558,940.
Cattle, Beef	20	800.		800.
Cattle, Milch Cows	389	11,243.		11,243.
Cattle, Bulls	138	3,155.		3,155.
Sheep	6150	12,300.		12,300.
Goats	311	622.		622.
Swine	112	344.		344.
Railroads, Standard Gauge, main line	200.35			
Railroads, Standard Gauge, side track	2.5	969,145.	194,856.95	1,164,001.95
Railroads, Narrow Gauge, main line				
Railroads, Narrow Gauge, side track				
All Other Property	.....	963,631.48		963,631.48
Total value of all property	.....			7,498,081.43

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, James F. Duncan, Clerk of the Board of Supervisors of Cochise County, Arizona Territory, do hereby certify that the fore-
313 going statement is a full, true and correct abstract of the original assessment roll of —— County for the fiscal year — as appears upon said Roll now on file in my office.

[SEAL.] (Signed) JAMES F. DUNCAN, *Clerk.*

Mr. CLARK: With the permission of counsel, we will release the witness from testifying in this matter. You may be excused Captain Duncan.

Mr. CLARK: If Your Honor pleases, we now desire to offer something that the defendants have already offered in the plea and abatement. We desire to offer as a part of our case, the Amended Complaint in case No. 2239 in this Court, entitled Copper Queen Consolidated Mining Company vs. County of Cochise and M. D. Scribner. It is already in, but we desire to make it a part of our case.

The COURT: Any objection?

Mr. ELLINWOOD: No objection.

The COURT: Let it go in.

Mr. CLARK: We will have it marked as our Exhibit "I."

Said paper was introduced in evidence, and the same will be found on pages 4, et seq. in this transcript.

314 Mr. CLARK: Now, I also desire the Findings of Fact and Decree in the same case, No. 2239.

Mr. ELLINWOOD: No objection; have that marked though Mr. Clark.

Mr. CLARK: We will have that marked as "Plaintiff's Exhibit "J."

Said Findings of Fact *was* marked "Exhibit J," and introduced in evidence, and will be found on pages 23, et seq. herein.

And the Decree of the Court was marked "Exhibit K," and *were* introduced in evidence, and will be found at page*d* 27, et seq. in this transcript.

Mr. CLARK: We offer now, if the Court pleases, certified copy of the contract.

Mr. ELLINWOOD: Let's have these marked before we go any further.

Mr. CLARK: All right.

Mr. ELLINWOOD: Otherwise we will get it all tangles up here.

Mr. CLARK: Now, we offer contract between the County of Cochise and W. G. Gilmore relating to the collection of back taxes, as attorney for the collection of back taxes, dated January 8th, 1908.

315 Mr. ELLINWOOD: What is the purpose of this?

Mr. CLARK: To show that the suit was brought by proper authority.

Mr. ELLINWOOD: No objection.

Mr. CLARK: We will ask that it be marked "Plaintiff's Exhibit L."

Said paper was marked "Exhibit L," and was introduced in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT "L."

"Copy.

Contract.

Know all men by these presents, That J. N. Gaines, as Treasurer and Tax Collector in and for the County of Cochise, Territory of Arizona, does hereby employ W. G. Gilmore, Attorney at Law, as attorney to do all the necessary legal work in the collection of delinquent taxes now on the Back Tax Books of said Cochise County for the year 1907, as well as all delinquent taxes now on said Back Tax Book for all the years previous thereto, according to Section 86 of Act 92 of the Session Laws of Arizona for the year 1903.

316 It is hereby mutually agreed by and between the parties hereto that the said W. G. Gilmore shall receive as compensation for his services as said attorney in the collection of said delinquent taxes, twenty-five per cent of any and all amounts of said delinquent taxes actually collected by process in Court and paid into the treasury of said Cochise County.

Executed in triplicate this the 8th day of January, A. D. 1908.

J. N. GAINES,
As Treasurer and ex-Officio Tax Collector of the County of Cochise, Territory of Arizona.

W. G. GILMORE,
Attorney at Law.

(Endorsed:) W. G. Gilmore. Appointment and Contract as Tax Attorney. Filed Feb. 3, 1908. H. E. Berner, Clerk. Approved Feb. 12, 1908.

I, H. E. Berner, Clerk of the Board of Supervisors of Cochise County, Territory of Arizona, do hereby certify that the within and foregoing is a true and correct copy of the contract existing between J. N. Gaines, Treasurer and ex-officio Tax Collector of the County of Cochise and Territory aforesaid, and W. G. Gilmore, as Tax Attorney for the collection of back taxes due said county. The

317 same was filed in the office of the Board of Supervisors February 3, 1908, and approved February 12, 1908.

[SEAL.] H. E. BERNER,
Clerk Board of Supervisors."

Mr. CLARK: If Your Honor pleases, I think with the exception of the certified copies of the patents that we have just mentioned, why, there is nothing else that we can offer tonight. We will have a witness or two, but we haven't them here tonight. We will have to ask that a recess be taken.

The COURT: Do you wish a recess taken?

Mr. CLARK: Yes sir.
The COURT: To what hour in the morning?
Mr. CLARK: I would suggest until nine o'clock in the morning.

The hour of five o'clock having arrived, the further hearing of this cause was continued until nine o'clock in the morning.

TOMBSTONE, ARIZONA,
WEDNESDAY, *October* 25, 1908—9.00 o'clock a. m.

The COURT: Are you ready to proceed with this case?
318 Mr. CLARK: We will be ready in just a moment, Your **Honor.**

C. A. McDONALD, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. CLARK:

Q. You are the County Recorder of Cochise County?
A. Yes sir.
Q. And you are the custodian of the records of Cochise County?
A. I am.
Q. Do you have here in the court room the books of record showing the, or containing the record of certain patents to the Copper Queen Mining Company?

Mr. ELLINWOOD: Now, we object; the records will show themselves what they are.
Mr. CLARK: I am asking him if he has the books here.

A. I brought some books up that I was called upon to bring up; I don't know what they contain.
Q. You don't know as to that?
A. Not without looking.

319 Mr. CLARK: Now, for the benefit of Court and counsel, we propose to prove by this witness, as the county Recorder, and we now offer to prove the patents from the United States of the mining claims, patented mining claims mentioned and described in the complaint, and in the plaintiff's exhibit to the complaint, and in the list, the assessment list of property as returned by the defendant to the Assessor of Cochise County for the year 1901. We propose at this time to offer the records themselves of those patents, and we propose to supplement that by certified copies, which we have not at this time.
Mr. ELLINWOOD: To which I object; the records themselves are not evidence under our statute.
Mr. CLARK: The statute makes them expressly.
Mr. ELLINWOOD: When a record is offered?
Mr. CLARK: We offer the record.
Mr. JUDSON: You can't incorporate it in the record in this case.
Mr. ELLINWOOD: You can't get it in unless you read it in.

Mr. JUDSON: Then there is a further objection, and that is that he testimony itself is inadmissible. In a proceeding to enforce a ien, the Territory's lien against specific property, there is but one foundation of that lien, and that is the Assessment Roll. It 320 was decided, that has been the uniform decisions of the Supreme Court of Missouri in construing this statute, and it vas held by the Supreme Court of this territory in the case that was ited by counsel yesterday, the Atlantic and Pacific Railroad Company vs. Yavapai County, construing the assessment law of 1889.

The COURT: What page?

Mr. JUDSON: Page 768.

The COURT: Well?

Mr. JUDSON: It says—I was struck with the fact that counsel cited this case saying that certain portions of your revenue law was taken from Illinois. That is true. The delinquent tax law existing in Arizona before the Acts of 1901 and 1903 is taken from Illinois, and here is what this Court says about it: "The proceedings are based upon chapter 7 of the revenue laws of the Revised Statutes", and says "The statute above referred to is taken from the revenue law of Illinois of 1871 and 1872, and by the Courts of that state has received this liberal construction. In a line of decisions in that state, promulgated before this enactment in this territory, this statute had been construed, and by adopting it, the construction was also adopted". If this is true of the law of Illinois in 1887, it is true of the law of Missouri adopted in 1903, and it seems 321 to me that leaves no need for further demonstration. I understand Your Honor has held that again and again in this state. Now, you have adopted this statute, and by an Illinois series of decisions it is held that the assessment cannot be corrected by the official description of the property. The state makes its lien when the assessment is put on the books. That is also the ruling of the Supreme Court of Missouri. The- cited those cases the other day.

The COURT: Let me ask you.

Mr. JUDSON: Yes.

The COURT: This assessment was levied on sixty five patented mining claims near Bisbee, now is it admitted that these mining claims are patented mining claims?

Mr. CLARK: Yes sir, that has been admitted.

Mr. JUDSON: We do not admit anything.

Mr. CLARK: They proved it themselves by offering the amended complaint.

Mr. JUDSON: Let me read the syllabus of these decisions of the Supreme Court of the United States.

The COURT: If there is any controverted question as to whether these mining claims are patented mined, the record may be introduced to sustain that.

Mr. CLARK: There is no question.

Mr. JUDSON: There is no question as to that.

322 *Argument of Counsel.*

The COURT: I see no occasion to modify the ruling I have already made in regard to it The assessment roll and the complaint allege that these were patented mining claims, and if there is any question raised as to their being patented, the patents of the entire sixty-five may be offered to sustain that fact, but beyond that I will sustain the objection. In other words, not having the allegation in the complaint or in the Assessment Roll that they were patented at such a time and on such a date, I don't think it would be proper to introduce that.

Mr. CLARK: However, we make an exception—we make the offer and desire an exception noted.

The COURT: The exception is noted to all rulings.

Witness excused.

Mr. CLARK: The plaintiff rests.

And the plaintiff here rested *their* case.

And the defendants offered and introduced the following evidence to-wit:

Mr. ELLINWOOD: May it please the Court, on the Plea of Abatement, the minutes of the Board of Supervisors was introduced
323 and read in evidence, and I was to supply a certified copy of these minutes. I have them copied now, and ask to have them entered in the record at that place and so marked.

Mr. CLARK: I desire to offer the further objection to those. I had not seen the record when they were offered, but the minutes do not appear to have been signed by any member of the Board of Supervisors.

Mr. ELLINWOOD: May it please the Court, that was upon the Plea in Abatement, and was long since passed, and the record discloses the signature of the Clerk of the Board, whose duty it was to have it, and it is in the minute book, and I think it is very late for that objection now.

The COURT: The Plea in Abatement was denied. He produced the minutes here, and was allowed to take them back for a certified copy.

Mr. CLARK: That was the basis of my objection before, that it did not appear to have been passed by the Board of Supervisors, and this is the same line, the minutes do not appear to have been ever signed, so that it is substantially the same.

Mr. ELLINWOOD: May it please the Court, it will come up again in the main case. I would like to have it in the Plea in Abatement though also.

324 The COURT: It may go in.

Mr. ELLINWOOD: I now offer in evidence—this is in the case in chief, the minutes of the Board of Supervisors of June 7th, 1904 on our defense as pleaded. It is the same paper that was

offered before in the plea and abatement, and I wish to have it in the main case.

The COURT: Those are the minutes as before?

Mr. ELLINWOOD: Yes sir.

The COURT: Those are the minutes that you offered a moment ago on the plea and abatement?

Mr. ELLINWOOD: Yes sir.

Mr. CLARK: For what purpose is that being offered?

Mr. ELLINWOOD: Under the allegation of the answer that this suit was compromised by the Board.

Mr. CLARK: Yes, of course; we shall object to it.

Mr. ELLINWOOD: Well, we expected you would object to it.

Mr. CLARK: We object to it for the reason that the compromise offered has been declared by the Supreme Court of this territory as being null and void, and it would serve no purpose in this action, or any other action.

325 Mr. ELLINWOOD: That is to the legal effect entirely when the sace gets in, and I presume we have a right to have this tested, and go up in the record. It may possibly go beyond the Supreme Court of the Territory.

The COURT: It may go in subject to the objection.

Said paper was now marked "Exhibit 1A", and a copy of same will be found on page 54 of this transcript, to which reference is made.

Mr. ELLINWOOD: Now, I offer in evidence a certified copy of the Articles of Incorporation of the Copper Queen Consolidated Mining Company.

Mr. CLARK: Well, we will object to it for the reason that they do not plead in their answer that they have complied with the laws of this Territory by filing a certified copy of their Articles of Incorporation. They merely stated they are a corporation, incorporated under the laws of the state of New York, and they undertake to show by their answer that they are residents of the territory of Arizona, and this testimony is not admissible under a plea of that kind. There is no foundation laid for its admission; it is a sort of an impeachment of their own pleadings, but I will not object to it on that ground, however.

The COURT: It goes in subject to the objection as the others did.

326 Said Articles of Incorporation were now marked "Exhibit 2A", and were introduced in evidence, and are in the words and figures following, to-wit:

EXHIBIT 2A.

Territory of Arizona, Office of the Secretary.

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, Isaac A. Stoddard, Secretary of the Territory of Arizona, do hereby certify that the annexed is a true and complete transcript of

the Articles of Incorporation of the Copper Queen Consolidated Mining Company which was filed in this office on the 11th day of December, A. D. 1885 at 9:40 o'clock a. m., as provided by law.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal. Done at the City of Phoenix, the Capital, this 12th day of August, A. D., 1902.

[Seal of the Secretary of Arizona.]

ISAAC A. STODDARD,
Secretary of the Territory of Arizona.

327 UNITED STATES OF AMERICA,
State of New York.

By Joseph A. Carr, Secretary of State and Custodian of the Great Seal Thereof.

I, Joseph A. Carr, Secretary of State of the State of New York, do hereby certify that I am Secretary of the State of New York, that the certificate and attestation attached to the annexed instrument is my certificate and made by me on the day and date thereof, and that I am the proper officer to make such certificate and attestation, and that the seal attached thereto is the seal of the office of the Secretary of State of the State of New York, and that I am the proper custodian and keeper of the Great Seal of said state, and that said certificate and attestation is in due form.

In Testimony Whereof, the Great Seal of the State is hereto affixed.

Witness my hand at the City of Albany, the 25th day of November, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] JOSEPH B. CARR,
Secretary of State.

328 *Certificate of Incorporation or Articles of Association of the Copper Queen Consolidated Mining Company.*

CITY AND COUNTY OF NEW YORK,
State of New York, ss.

Be it known, that we, the undersigned, Horace K. Thurber, William H. Martin, William E. Dodge, Jr., D. Willis James, and Edward Smith, all of the City, County and State of New York, and Charles C. Martin and Clarence F. Birdseye, of the City of Brooklyn, County of Kings and State of New York, who desire to form a corporation pursuant to and in conformity with Chapter 40 of the Laws of New York, for 1848, being the act of the Legislature of the State of New York, passed on the 17th day of February One thousand, eight hundred and forty-eight, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," and the several acts of said Legislature

amending, modifying or extending the same or supplementary thereto, do by these presents associate ourselves together and form a body politic and corporate under the name and style of the Copper Queen Consolidated Mining Company, and the following are hereby declared to be

1st. The corporate name of said company.

2nd. The objects for which the company is formed.

3rd. The amount of the capital stock of the said company.

4th. The number of shares of which the said stock shall consist.

5th. The term of existence of the said company.

6th. The number of Trustees and their names who shall manage the concerns of the said company for the first year.

7th. The name of the Town and County in which the operations of the said Company are to be carried on.

First. The corporate name of the said company is hereby declared to be the Copper Queen Consolidated Mining Company.

Second. The objects for which the said company is formed are the obtaining, quarrying, producing, mining, roasting, smelting, treating and reducing of copper, iron, silver, gold, or other ores or substances, and the manufacturing, producing and producing therefrom and disposing of copper, iron, silver, gold or other metals or substances, and the acquiring, purchasing and holding, managing, operating, carrying on, and rendering productive all such lands, premises, mining claims, quarries, mineral deposits, veins, leads or formations, ores, fluxes or other material, manufactured or unmanufactured, stock, buildings, roads, tracks, tramways, furnaces, smelters and other machinery, fixtures, property and effects as may be necessary, proper or convenient for the said company in or about or in the course of its aforesaid business, and generally to do, perform and transact all acts and things connected with or incidental to the development, prosecution, carrying on or management of the said business in any or all departments thereof.

Third. The capital stock of the said company shall be one million, four hundred thousand dollars.

Fourth. The number of shares of which the said stock shall consist shall be one hundred and forty thousand shares of ten dollars each share.

Fifth. The said company shall commence on the sixth day of August in the year one thousand eight hundred and eighty-five, and shall continue in existence for the term of fifty years.

Sixth. The number of trustees who shall manage the concerns of said corporation shall be seven, and the names of those who shall manage the concerns of said corporation for the first year are Horace K. Thurber, William H. Martin, William E. Dodge, Jr., D. Willis James, Edward Smith, Charles T. Martin, and Clarence F. Jarvis, all of whom are citizens of the United States and of the state of New York.

Seventh. The company is formed for the purpose of carrying on some part of its business out of the state of New York, to wit: In the Town of Bisbee, in the County of Cochise and Territory of Arizona.

and in all such other places or locations wherein it shall hereafter purchase or acquire property; but the principal part of the business of said company within the state of New York is to be carried on at the City of New York, in the County and State of New York; and the office and principal place of business of said company shall be at the City of New York in said County and State of New York.

In Witness Whereof, the said incorporators and trustees above named have hereunto subscribed their names and affixed their seals this sixth day of August one thousand eight hundred and eighty-five.

HORANCE K. THURBER. [L. S.]
W. H. MARTIN. [L. S.]
332 W. E. DODGE, JR. [L. S.]
D. WILLIS JAMES. [L. S.]
EDWARD SMITH. [L. S.]
C. C. MARTIN. [L. S.]
CLARENCE F. BIRDSEYE. [L. S.]

In presence of
FRANK H. PARSONS.

CITY AND COUNTY OF NEW YORK, *ss:*

Be It Known that on the 7th day of August one thousand, eight hundred and eighty five, before me personally appeared the above named Horace K. Thurber, W. H. Martin, William E. Dodge, Jr., D. Willis James, Edward Smith, Charles C. Martin and Clarence F. Birdseye, to me severally personally known, and known to me to be the individuals described in, and who executed the foregoing certificate in writing, and severally duly acknowledged to me that they signed and executed the same for the purposes therein mentioned.

[SEAL.] FRANK H. PARSONS,
Notary Public Kings County.

Cert. Filed in N. Y. Co.

STATE OF NEW YORK,
City and County of New York, ss:

I, Patrick Keenan, Clerk of the said City and County, and Clerk of the Supreme Court of said state for said county do certify
333 that I have compared the preceeding with the original certificate of incorporation, of the Copper Queen Consolidated Mining Company on file in my office, and that the said is a correct transcript therefrom, and of the whole of such original.

Endorsed, filed and recorded Aug 7, 1885.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal this 21st day of Nov. 1885.

[SEAL.] PATRICK KEENAN, *Clerk.*

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceeding with the original certificate of incorporation of Copper Queen Consolidated Mining Company with acknowledgment thereto annexed filed and recorded in this office on

the tenth day of August, 1885, and do hereby certify the same to be a correct transcript therefrom, and of the whole of said original.

Witness my hand and the seal of office of the Secretary of State at the city of Albany this 25th day of November, one thousand, eight hundred and eighty-five.

[SEAL.] JOSEPH B. CARR,
Secretary of State.

334 State of New York. Office of Secretary of State. Filed and recorded Aug. 10, 1885, 9 hr. 15 m.

AMONG G. WOOD,
Deputy Secretary of State.

(Endorsed:) Filed Dec. 11th, 1885 at 9:40 A. M.
T. E. FARISH,
Ass't Secretary."

Mr. CLARK: If this is offered for the purpose of showing that this concern was incorporated under the laws of the state of New York, then I shall object to it on the ground that it is not authenticated. It is authenticated by the Secretary of Arizona.

Mr. JUDSON: I submit in Arizona, that is the best kind of evidence for the Secretary of the Territory to certify to it.

Mr. ELLINWOOD: Our rules of evidence provide that a certificate of the Secretary of State is sufficient.

Mr. CLARK: That would be true if they pleaded the filing of them in this Territory, but they have not pleaded it, and they offer it to show that they were incorporated under the laws of the state of New York.

The COURT: It goes in subject to the objection; if the objection is good, it will be stricken out.

335 Mr. ELLINWOOD: I now offer a certified copy of a motion to dismiss a certain action in the District Court of the Second Judicial District of the Territory of Arizona in and for the county of Cochise numbered 2239, in the case of the Copper Queen Consolidated Mining Company, a corporation, plaintiff, vs. The County of Cochise and M. D. Scribner, Treasurer and Ex-Officio Tax Collector.

Mr. CLARK: Signed by William Herring, attorney for the plaintiff?

Mr. ELLINWOOD: Yes sir.

The COURT: Let it go in.

Said paper was marked "Exhibit "3A." and was introduced in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT 3A.

"In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Plaintiff,

vs.

COUNTY OF COCHISE and M. D. SCRIBNER, County Treasurer and ex-Officio Tax Collector, Defendants.

Motion to Dismiss.

336 Now comes the plaintiff, Copper Queen Consolidated Mining Company, a corporation, by its attorney, William Herring, and moves the Court that, the above entitled action, wherein Copper Queen Consolidated Mining Company, a corporation, is plaintiff and the County of Cochise, and M. D. Scribner, County Treasurer and ex officio Tax Collector, are defendants, having been compromised and settled, said action be dismissed at plaintiff's costs.

WILLIAM HERRING,
Attorney for Plaintiff.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I hereby certify the annexed and foregoing to be a full, true and correct copy of the motion to dismiss in the cause entitled Copper Queen Cons. Mining Co. a corp. vs. Cochise Co. & M. D. Scribner, Col.—reg. No. 2239 on file in the Clerk's office of the District Court of the Second Judicial District of the Territory of Arizona, in and for the County of Cochise.

Witness my hand and the seal of said Court this 24 day of November, A. D. 1908.

[SEAL.]

GEO. B. WILCOX, *Clerk.*
By W. E. BOGGS,
Deputy Clerk.

Mr. ELLINWOOD: I now offer in evidence a certified copy of the Clerk of this Court as to the minute entry dismission- said
337 action.

Mr. CLARK: No objection.

Said paper was now marked "Exhibit 4A" and was introduced in evidence, and a copy of the same will be found as "Exhibit 5" on page 33 of this transcript, to which reference is hereby made.

WILLIAM HERRING, being called as a witness on behalf of the defendants, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ELLINWOOD:

Q. Your name is William Herring
A. Yes sir.
Q. You are an attorney at law?
A. Yes.
Q. Were you the attorney of the Copper Queen Consolidated Mining Company, a corporation, vs. Cochise County and M. D. Scribner, ex-officio Tax Collector, defendant?
A. Yes.
Q. In the action numbered 2239 in the Second Judicial District of the Territory of Arizona in and for the County of Cochise?
A. Yes.
Q. By a certificate of the Clerk of this Court introduced in evidence it shows that on June 25th, 1904, said action was dismissed; can you state the reasons for the dismissal of that action?

338 Mr. CLARK: We object to it as absolutely immaterial what his reasons were; it would not tend to prove any allegation in the answer.

Mr. ELLINWOOD: Yes, I think I have that in here. You will find it on page 28 of the Answer: (Reading) "That thereafter, on or about the 16th day of June, 1904, relying upon said compromise and settlement, and in accordance therewith, and at the special instance and request of the said defendants M. D. Scribner, Treasurer and ex-officio Tax Collector of Cochise County, and said Cochise County, the plaintiff in said suit, Copper Queen Consolidated Mining Company, filed its certain motion to dismiss said action then pending as aforesaid, the same appearing upon the docket of said District Court as case No. 2239, and that thereafter on the 25th day of June, 1904, said motion came on for hearing, and it was by said Court ordered and duly entered of record in the minutes of said Court that said cause No. 2239 entitled Copper Queen Consolidated Mining Company vs. Cochise County, et al. be and the same is hereby dismissed; and that since said last mentioned date no further proceedings have been had or taken in said action."

Mr. CLARK: Now, if Your Honor please, our objection to that is, I have cited cases to the point that the compromise upon which this dismissal was based was and is absolutely void and of no effect, and it has been so judged by our Supreme Court of the Territory

339 of Arizona. That the basis of the offer of the testimony being a nullity, the testimony itself must, of necessity, serve no purpose in the case.

Mr. JUDSON: The evidence is clearly admissible on distinctly another ground. A dismissal of a bill in equity is on its face, when unexplained, an abandonment by the plaintiff of his claim, evidence, therefore, is always admissible to show that an adjudication or final judgment of dismissal was not a judgment upon its merits, but was in furtherance of a compromise. Now, we have another

case of a dilemma. Either the compromise was good or it was not good. If it was not good, the bassis on which we dismissed failed, and our cause of action was never adjudicated, so that the very point made by counsel answers itself. That very point was changed by the Supreme Court of the United States. I call the Court's attention to the case of Jacobs v. Marks. This decision is in the 182 United States, page 581, reported in the 45 Lawyers' Edition, page 1241 was a suit upon a judgment of another state, and there was evidence that there had been a dismissal of a cause of action, and evidence was offered to show that that dismissal was on the basis of a compromise, or in consequence of a compromise of a cause of action, the Court says: "The entry of discontinuance of an action in a court of another state was not intended by the parties as a release
340 and satisfaction of a cause of action, but was the result of a promissory agreement which was never complied with, is competent in a later action by the same plaintiff to support a replication to a plea that plaintiff had received full sa:isfaction and payment of the claim." The Court said: Decided by Justice Shiras, and with the unanimous opinion of the Court. "The entry that the 'cause is hereby discontinued by consent of both parties, without cost to either party,' although entered as a judgment of the Court, does not of itself import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment." The case of Halderman v. United States, 91 U. S. 584, is quite in point. There a judgment entered in the words 'dismissed agreed' was pleaded in a subsequent action, as a former recovery, but it was held by the Circuit Court and by this court that such an entry did not sustain the plea. It was said by Mr. Justice Davis, delivering the opinion: 'It is a general rule that a plea of former recovery, whether it be by confession, verdict or demurrer, is a bar to any new action of the same or like nature for the same cause. This rule conforms to the policy of the law, which required an end to the litigation after its merits have been determined. But there must be at least one decision on the right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit." Held:
341 "Suits are often dismissed by the parties; and a general entry is made to that effect without incorporating in the record, or even placing on file the agreement." Now, it is wholly immaterial for the purpose of the relevancy of this testimony whether that compromise was good or was not good. If it was good, it stands, and if it was not, we have a right to the testimony in explanation of it.

The COURT: I don't know what the offer is made for, but I take it that they have a right to this testimony to show their reason for dismissing that case. The fact that it was based upon a compromise that was afterwards declared to be void would not enter into the suit at the time they dismissed or arrived at that compromise. In other words, they are entitled to the testimony to show why they dismissed the case.

Mr. CLARK: That being the attitude of the Court, such dismissal would not be binding upon the Territory of Arizona.

The COURT: Simply showing their right to explain their actions.

(Question read by the Reporter, as follows: "Q. By a certificate of the Clerk of this Court introduced in evidence it shows that on June 25th, 1904, said action was dismissed; can you state the reasons for the dismissal of that action?")

342 A. Yes sir, I can state it.

Q. Will you please do so?

Mr. CLARK: The same objection as already made.

The COURT: The objection is overruled.

A. As counsel for the Copper Queen Consolidated Mining Company, and its attorney of record in the case referred to, I became informed that there was an expression or wish on the part of the Board of Supervisors of Cochise County, and the District Attorney of that county that the——

Mr. CLARK: Now, we object to this hearsay testimony. He says that he was informed.

Mr. ELLINWOOD: This is preliminary. He is not stating anything that anybody said; simply showing on what he acted.

Mr. CLARK: It is objected to on the further ground that it is self-serving.

The COURT: It is subject to that objection.

Mr. ELLINWOOD: That is all the evidence that we put in, is self-serving.

The COURT: Proceed.

Mr. ELLINWOOD: Proceed.

A. (Continuing:) I became informed of the wish and desire of the authorities of the county, and the gentleman referred to, the District Attorney, I think Allen R. English at that time, to compromise and settle the action in question, and with a view

343 to the final settlement and compromise of the action, I prepared an instrument, the instrument which is here, and now introduced in evidence in relation to that compromise, and the object of that preparation was to compromise, settle and end that litigation. In my correspondence with the District Attorney of the County and the County Treasurer. I wrote him when I was informed that the terms of the compromise was satisfactory, which was communicated to me by correspondence, it was then that this instrument was prepared, and as I say, its purpose was to definitely, fully and finally settle the litigation in question, and having been advised that the propositions between the parties were entirely satisfactory to the Board of Supervisors, and that the compromise was effective and accepted and adopted by the Board, I prepared the motion for dismissal on the grounds stated in the motion, to-wit: That the suit had been, I think, compromised and settled, or settled and compromised, or words to that effect, in the paper which I caused, as the attorney of the Copper Queen Consolidated Mining Company, to be filed in this Court, and upon that motion a dismissal was made.

Q. I notice in the resolution of compromise by the Board of Supervisors, which has been admitted in evidence, it shows that the same

was made upon the consideration of the sum of 5,661.41.
344 I will ask you if that sum was actually paid to the Board of Supervisors of the County of Cochise?

A. It was.

Q. Who paid it?

A. Paid by the treasurer—paid by a draft direct from the superintendent of the Copper Queen Consolidated Mining Company at that time.

Q. I will ask you for what was the payment made?

A. The payment was made because it was in satisfaction of the then existing—of all then existing claims, and was regarded as a settlement of the existing litigation of the demand of the county.

Mr. CLARK: We move to strike that out, if Your Honor please, as the alleged compromise speaks for itself in that matter, and will not be varied by testimony.

Mr. ELLINWOOD: It is not varied; it is supported, if anything.

Mr. CLARK: If it needs support, it can't be done that way.

The COURT: The motion will be overruled. The answer whether or not—the direct statement that the money was paid in accordance with the terms of the compromise may be stricken out.

Mr. CLARK: Before proceeding with the cross examination, I move to strike out all the testimony of this witness for the
345 reasons stated in my objections to the testimony, and for the further reason that the motion for dismissal introduced in evidence by the attorney, in case No. 2239, shows upon its face the reasons for the dismissal, and those reasons are sufficient in themselves.

The COURT: I think myself, I think that covered the ground as fully as the oral testimony.

Mr. ELLINWOOD: It would only be accumulative evidence at best.

Mr. CLARK: On its face, it shows everything necessary.

Mr. ELLINWOOD: If not contradicted, it would be all right.

The COURT: There are some statements that would be subject to a motion to strike, but I would not want to strike out from the record all of it, because the defendant is entitled to as much of it as goes to show that the witness, as counsel for the defendant, made the motion in pursuance of an agreement theretofore made and that he ordered the case dismissed.

Mr. JUDSON: And that he paid the money also.

The COURT: Yes.

Mr. CLARK: We admit the payment of the money.

Mr. JUDSON: We have the right to show it.

346 Mr. CLARK: I don't doubt that, but it would be immaterial.

Cross-examination by Mr. CLARK:

Q. Colonel Herring, I believe you prepared the resolution of compromise entered into between the Copper Queen Company and the Board of Supervisors on June 1904?

A. I prepared the resolution.

Q. The one that has been offered in evidence, I am speaking of?

A. Yes.

Q. You prepared that?

A. Yes; that is, the manuscript of the resolution.

Q. You did that, you say, at the instance of suggestions of various county officers?

A. Yes.

Q. The suggestion, then, that this matter be compromised moved from the county officers to you?

A. Not fully; there had been some discussion, just what discussion, what it amounted to, I can't now state, but there had been a discussion between the, I think, then chairman of the Board, or a member of the board, and some of our people at Bisbee; some of the representatives of the Copper Queen Consolidated Mining Company at Bisbee.

347 Q. Yes.

A. And I became informed from that source that there was a disposition to compromise the case.

Q. Will you say positively that the first suggestion of compromise came from the county, or from the county officers to the Copper Queen?

A. No, I won't.

Q. On the contrary, would you say that it came from the Copper Queen, the first suggestion of compromise?

A. No, I do not.

Q. You don't say either way as to that?

A. I don't remember accurately on that subject.

Mr. ELLINWOOD: I will say that if this was a case of assault and battery, the fellow that hit the first blow would be material, however, this is absolutely immaterial.

Mr. CLARK: Counsel has seen fit to elicit this testimony, and I have a right to cross examine.

The COURT: Proceed.

Q. Do you recall, Colonel Herring, from whom the suggestion that this matter be compromised for $5,661.00 came from; do you know where that figure had its origin, of that suggestion?

A. I do not.

Q. How is that?

348 A. I don't know.

Q. You don't remember how it first came to you?

A. No.

Q. You knew what the amount of taxes in the case existing between the Copper Queen and the county amounted to?

A. Yes, sir.

Q. You knew that it amounted approximately to a hundred thousand dollars?

A. I did.

Q. It was known to you at that time, at the time this resolution

was drawn that the county of Cochise had agreed to pay its attorney, Allen R. English, and others, five thousand dollars?

A. I don't remember whether I knew that at that time or not; I think I did subsequent. Probably I did know it at that time.

Q. Well?

A. I don't recall whether I knew it or not; I think it is very likely that I did.

Q. I ask that from the fact that it is embodied in the resolution?

A. Yes, I think I did.

Q. Now, the resolution also provided in addition to this five thousand dollars, there should be paid to the County of Cochise $661.00?

A. I think so.

349 Q. Do I understand you to state that at that time that was considered to be a good compromise for the County of Cochise?

A. I have not passed upon the question of whether it was a good or a bad compromise.

Q. I am asking you whether it was?

A. I acted in the capacity of attorney for the Copper Queen Consolidated Mining Company, and the conclusions which had been reached between the parties were incorporated by me in the instrument, to which you have referred as being on file in this suit.

Q. As to the making up of the agreement between the parties; that is to say, the company that you represented and the county, you had nothing whatsoever to do? I say, in arriving at this agreement that it should be $5,661.00 paid to the county of Cochise, you personally had nothing to do with bringing that about?

A. Not that I can remember; it was a matter that did not concern me personally, but professionally, after learning the facts that the parties desired to compromise.

Q. Did you have any conversation with any of the attorneys for the county or the officers of the county in which you, yourself, exerted any influence toward bringing about this compromise?

A. I don't think I had the slightest influence or confidence or conversation with any attorney of the county in relation to the bringing about of the compromise.

350 Q. Did you have any dealings with any of the attorneys for the county as to the payment or advancing of a fee, or any part of a fee, which they would receive from the county?

A. Not that I can remember, no; there was no reason for any such action on my part.

Q. Specifically, did you agree with Allen R. English that you would pay or advance him any part of that fee, or lend it to him prior to this compromise?

A. I have some recollection of Mr. English writing to me that after the compromise had been finally agreed upon——

Q. I say, do you——

A. Wait. After the compromise had been agreed upon, when he stated what the amount was, he, as counsel, he had some indebted-

ness to me, and I think he asked me to advance him, I think it was a couple of hundred dollars; it might have been more or less, and that he would regard it as a persosal favor if I would do so, and for that amount, whatever it was, he would give me an order on the treasurer or the board of supervisors to reimburse me for what I advanced, and I think I wrote him that upon receiving his order to that effect, that I would send him a check for the amount that he requested; it was a small sum of money that he wanted.

Q. You had no conversation with him prior to receiving this letter from him?

351 A. None whatever.

Q. Neither here in Tombstone or in Tucson?

A. At no place on this earth that I remember.

Q. Did he send you the order which you refer to?

A. My impression is that he did.

Q. And did you present that order to the Board of Supervisors?

A. I either presented it to the—I remember that the money was *repair*, whether by Mr. English or by some one in his behalf, I don't remember.

Q. Was there any other attorney representing the county in any capacity at that time with whom you had any dealings of that sort?

A. Not that I can remember of; I don't think there was; I don't think that any one but Mr. English.

Q. Will you say positively?

A. I do not; I don't think there was.

Q. Will you say positively whether it cost the Copper Queen Consolidated Mining Company any money to secure the passage of that resolution?

A. I will say positively and unequivocally that not one penny of the funds of the Copper Queen Consolidated Mining Company, or any person connected with it, ever passed to a mortal soul, other than the money which was represented in that instrument.

352 Q. You say that positively?

A. Absolutely and unequivocally.

Q. Directly or indirectly?

A. Directly or indirectly, or in any manner that language may describe.

Q. Prior to the election of the year 1900 or afterwards?

A. To the beginning of the world to the date of these presence.

Q. And prior to the election of 1902?

A. From the beginning of the world to the date of these presence.

Q. I am glad your memory extends that far back. I hope it is just as accurate as it is long?

A. Your hopes will never be disappointed.

Q. Well, that is gratifying.

Mr. CLARK: That is all.

Mr. ELLINWOOD: That is all.

Witness excused.

WALTER T. FIFE, being called as a witness on behalf of the defendants, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. JUDSON:

Q. Mr. Fife, you may state your full name and residence?
353 A. Walter T. Fife; Cananea, Mexico.

Q. Did you ever hold any official position in Cochise County, Arizona, and if so, what?

A. I did; I was assessor of Cochise County from 1900 to 1902.

Q. You were acting as assessor, and made the assessments in the year 1901?

A. Yes sir.

Q. I show you a paper marked "Exhibit A" in this cause, state if you ever saw that paper?

A. Yes sir.

Q. And if so, under what circumstances?

A. Why, it was sent to my office by the Copper Queen people in 1901 as their assessment list.

Q. Did you make—there appears to be a printed blank. That is, it appears to have certain printed matter on it; did you send the blank to the Copper Queen people?

A. I left it with them; I left it in their office.

Q. Was that your practice to leave such blanks with the tax payers?

A. Yes sir.

Q. This was in pursuance of your regular course of duty?

A. Yes sir.

Q. Now, was this returned to you by the Copper Queen Company?

A. It was returned to my office here, either to me or my deputy that I had.

354 Q. Now, this typewritten matter?

A. It was returned to me in fact, because I see my signature here.

Q. This is your signature?

A. Yes sir, it was at that time.

Q. I see at the close of this a form, what purports to be a form of affidavit. "Territory of Arizona, County of Cochise, ss: I, Walter Douglas, do solemnly swear that the foregoing list contains a full and correct statement of all property subject to taxation which Copper Queen Consolidated Mining Company owned, claimed, possessed or controlled at 12 o'clock M. on the first Monday in February last, and which is not already assessed this year, and I have not in any manner whatsoever transferred or disposed of any property, or placed any property out of said county or my possession for the purpose of avoiding any assessment on the same, or of making this statement. Signed, Walter Douglas", and then marked "Subscribed and sworn to before me this second day of July, 1901. Walter T. Fife." Did Walter Douglas swear to that before you?

Mr. CLARK: We object to that; the witness can't impeach his own affidavit. I ask the privilege of examination on that question before this answer is given.

The COURT: Very well.

355 Examination by Mr. CLARK:

Q. Is that your signature there, Mr. Fife?
A. Yes sir.
Q. It is?
A. Yes sir.
Q. You wrote that there yourself?
A. Yes sir.
Q. Did you have a seal of office? I believe not at that time?
A. No sir.

Mr. CLARK: The witness acknowledges that to be his signature, and he cannot impeach himself in that way, and at the same time impeach a record; it is not competent or admissible.

The COURT: The question may be answered.

Q. What is your answer?
A. I would like to have the question again.
(Question read by the Reporter as follows: "Did Walter Douglas swear to that before you"?)
A. No sir.
Q. State what was done by you in relation to that?

Mr. CLARK: Now, we object to that; it is immaterial; if Mr. Douglas did not swear to that, that is the only thing that is material here.

The COURT: The question may be answered.

356 Mr. CLARK: Note an exception.

Q. What was your answer?
A. Why, the list was turned into my office, and I signed it, as was the custom of all lists of all companies turned in the same way, and it was placed on the assessment rolls.
Q. You never took that to Mr. Douglas?
A. No sir.
Q. What did you do with this after it had been thus returned?
A. Placed it on the assessment rolls.
Q. Copied it from this?
A. Copied it from this.
Q. Were these values upon the—as shown in this exhibit "A" upon the paper when it was sent to you?
A. It has been so long ago, I don't remember.

Mr. CLARK: We say this is objectionable; the paper must speak for itself. There has been no proof here that there has been any alterations.

A. Yes sir.
Mr. JUDSON: I simply asked when they were put there.
Q. I see from this Exhibit A that six hundred and thirty-six acres—this item "six hundred and thirty-six acres, land value $3,180.00, assessed value, $55,431.76." Did you go personally about Cochise County in making your assessment of all classes of property?

357 A. Yes sir.
Q. You had deputies in your office, I suppose?

I. I had one.

Q. He acted under your instruction?

A. Yes sir.

Q. So that you had entire charge of the original assessments in the county that year?

A. I did.

Q. Do you know how many patented mines there were in the county at that time?

Mr. CLARK: We object, if Your Honor pleases, that is immaterial. We object for the reason that it is entirely immaterialy how many patented mines there were in the county. Patented mines, there might have been thousands, but it makes no difference. The defendant is probably seeking to show that different property of the same class as the property of the defendant was assessed in a certain way, or at a certain valuation. I assume that is the object and purpose of this line of testimony. I think counsel will not deny that. Now, it is not sufficient in a case of this kind for counsel merely to show that its property, patented mines, were assessed, and then seek to show by the assessor that other patented mines in the county were assessed at a different valuation. That does not establish nor tend to establish, if Your Honor please, that the patented mines of the

Copper Queen Consolidated Mining Company are of the
358 same class as the other mines in the county, of which he seeks to elicit testimony, and that requires no argument, and there is no foundation for it in the pleadings. The pleading merely is a conclusion of law that these sixty-five patented mining claims assessed for the year 1901 are of the same class as many other patented mines in the county. Now that is a conclusion, and in support of my position I cite the very case in the Supreme Court of the United States that was relied upon by counsel. In that petition there was no general allegation that the Chicago Union Traction Company was of the same class as several other traction companies in Chicago which were assessed a certain way. The pleader did not stop there, but he went on to show by a positive allegation a description of other properties as well as its own property that it was in the same class. That is to say, that it was a street railway company, employing electric power, of a certain value, and doing a certain business, and all that sort of thing. Everything was there to show that, in fact, there were other companies in Chicago of the same class as the petitioner, and with whom, or with whose assessment the petitioner had a right to draw a comparison. That is not the case here, and Your Honor takes judicial knowledge of the fact that there might be the widest difference between one group of mines patented mines, as far as the

valuation is concerned, and another one. One may be a
359 mere prospect, even though patented. It may be valuable because it may have some monuments on it, and it may have no value, and may never have, and there may be another less than a mile away worth millions of dollars. Are those two properties in the same class? Not by any method of reasoning in the world. Not any more than the Chicago Union Traction Company, doing millions of dollars worth of business year and a toy traction engine running

around the room by a small boy the day after Christmas. Not at all. Therefore, we object to any testimony going or tending to go, under these pleadings, to the proposition that there were other patented mines in the county of Cochise in the year 1901 assessed on a certain basis until it be shown, not by a conclusion of law, but by a proper pleading as to the facts and circumstances, whether the property of the Copper Queen is in the same class as this other. That is not a matter of proof; it is a matter of pleading, and there is no pleading upon which such testimony may stand.

The COURT: If this is being offered to support the pleading that there was an unjust discrimination against the defendant, I am inclined to view that the way is open to the defendant, still I agree with the theory offered by the attorney for the plaintiff. The rule is open, but in order to avail, it occurs to me that this testimony must show that a system or plan was adopted, or an action
360 had that pointed toward a different valuation as compared with its actual cash value of the patented mines of this defendant from the valuation in comparison with other actual cash valuations of other patented mines in the county.

Mr. JUDSON: That is what we propose to do; we are making the attempt.

The COURT: Very well.

Q. You heard the question, Mr. Fife?

A. Repeat the question.

(Question read by the Reporter as follows: "Do you know how many patented mines there were in the county at that time?")

A. I don't remember, no.

Q. It has been shown by the record in the case there were some three hundred and twenty-two mining claims, patented claims?

Mr. CLARK: What is that?

Mr. ELLINWOOD: You say that in your report sent to the Auditor.

Q. Did you assess all of the patented mines of your county?

A. Yes, sir.

Q. That year?

A. Yes, sir.

Q. At what rate did you assess them?

Mr. CLARK: Now, we object for the same reason; it is immaterial at what rate. It is assumed, as a matter of law, conclusively, that the assessor did his duty.

361 Mr. JUDSON: We have a right to show the facts.

The COURT: Let the question be answered.

Mr. CLARK: We say there is a record of that, and he must show by the record; he is testifying from his naked recollection as against the record.

The COURT: I think the point made by Mr. Judson is that the method can be shown by the man who makes the record. If the counsel insist upon the record being produced of the assessed valuation of the mining claims, he will be entitled to it.

Mr. CLARK: I most certainly do.

Mr. JUDSON: If this witness will say that he had a uniform rule

that he assessed them all at a certain rate, I have a right to prove that fact, and that is what I want to do.

Q. Did you have in that year a uniform rule by which you applied one rate of valuation to all patented mining claims in Cochise County?

Mr. CLARK: We object to that; the statute sets up the rule by which he must go, and if he departed from that rule, then he violated the law, and he may not show it by parol testimony. I object to it for the further reason that it calls for the conclusion of the witness rather than a fact, and a conclusion that a rule of that kind was adopted must appear before this court, if at all, from the records of the assessments made, and not from the conclusion of the
362 witness that he adopted a rule of this kind in the assessment of this class of property.

The COURT: I don't see the difference, because it would show that that was the rule adopted by the assessor. Very well.

A. Yes sir.

Q. What was that uniform rule?

Mr. CLARK: Same objection, and I wish to add the further objection, if there were such a rule, the Territory of Arizona is not bound by it, and was not bound by it; that is a rule made contrary to law.

The COURT: Very well.

Q. Answer the question?

A. Why, I assessed all patented mines at five dollars an acre all over the county.

Q. Was that the rule that you followed during your entire administration?

A. Yes sir.

Q. What did you do as to unpatented mines?

Mr. CLARK: We object, because they are not at issue here.

Mr. JUDSON: We have a right to show his course of action.

The COURT: I don't see what the bearing of unpatented mines would have on this question before the Court.

363 Mr. JUDSON: Only by way of illustration; I don't see that it has directly at all.

Q. Who was your predecessor in office?

A. George Perrin.

Q. Why did you adopt this rule and custom in the assessment of this class of property?

Mr. CLARK: We object.

The COURT: Objection sustained.

Mr. JUDSON: I submit, we have a right to show Your Honor, it may not be convincing to the Court, but we have a right to show, suppose it was adopted because it had been the custom of his predecessor. When he found it was the uniform custom prevailing in the state, would Your Honor say we had no right to show that?

The COURT: I think when you show the custom that was adopted by him during his entire term of office, I think that is sufficient. I feel inclined to sustain his objection. What he may have known or heard of the methods of his predecessor is not relevant.

Mr. JUDSON: We offer then to show by this witness that this custom or rule followed by him in assessments was that followed by his predecessor in office, and he was advised by the county officials under whom he acted, and was in accord with what he ascertained was the substantial uniform custom adopted throughout the territory.

Mr. CLARK: I am surprised at counsel, as a lawyer, making such an offer.

364 The COURT: Do you object to the offer?

Mr. CLARK: We object to the offer. Primarily, it would be hearsay, and secondly, he is unable to testify to what custom may have prevailed prior to his own term of office, otherwise than by hearsay, and if such a custom prevailed, the record will be the best evidence.

Mr. JUDSON: Custom is not proved by record; custom floats around by mouth; there is no record.

The COURT: The objection will be sustained.

Mr. ELLINWOOD: Note an exception.

Mr. JUDSON: You may take the witness.

Cross-examination by Mr. CLARK:

Q. Do I understand you, Mr. Fife, you signed your name to this affidavit knowing that Mr. Douglas had not appeared before you at all?

A. Yes sir.

Q. And do I understand you that you made a practice of doing that?

A. Yes sir.

Q. You did not administer the oath in a great many instances?

A. Some cases I did, when I was around, as a rule, I did not; none of these companies or corporations.

Q. Do I understand from that that you made a practice of swearing individuals but not representatives of corporations?

365 A. I don't remember as to that, but all corporations, mercantile business, they made a list and returned them to my office, and before I put them on my list, I signed my name to them.

Q. Did you personally enter this upon the assessment roll?

A. No sir, my deputy did; my deputy assessor in 1901.

Q. I notice that there are certain valuations carried out on this list and you have testified they were on there when you received this list?

A. Yes sir.

Q. You didn't make any assessment of that property of your own?

A. No sir, I left the list with the company and they returned it.

Q. You accepted whatever they gave you?

A. I did, which had been the custom always before.

Q. Did you do this more than one year with the Copper Queen Company, accept whatever they gave you for valuation?

A. I did.

Q. You did?

A. Yes sir.

Q. You did not take any pains to ascertain whether the property was worth any more or less or what?

366 A. We got more; the assessment was larger this year than it was.

Q. I say, did you personally make any investigation to see whether it was worth more?

A. No sir.

Q. Did you make any personal investigation to see whether all the property of the Copper Queen had been returned?

A. I think I did.

Q. Did you personally?

A. I don't remember; it was several years ago.

Q. Now, let me ask you Mr. Fife, did you know any of the mining claims embraced in this list during the year 1901?

A. Why, I knew the names of them: I was not familiar with *with* them, no.

Q. Did you know where they were?

A. I knew where some of them were.

Q. Did you know what work was being done with them or upon them?

A. I knew they were working some.

Q. Some?

A. Some of them, yes sir.

Q. Did you know anything about the smelter being down there at Bisbee that year?

A. Yes sir.

Q. Owned by the defendant, the Copper Queen Company?

367 A Yes sir.

Q. Did you know anything about the amount of production?

A. I did not.

Q. Did not ascertain that in making this assessment?

A. No sir.

Q. Did you know anything about the number of tons of ore per day being taken out?

A. No sir.

Q. Of any of those mines?

A. No sir.

Q. Did you know anything about the amount of dividends being earned by this company from these mines?

A. No sir.

Q. Didn't take any pains to ascertain?

A. No sir.

Q. Didn't inquire at the office?

A. No sir.

Q. Did you have any idea of your own as to the value of these sixty-five patented mining claims?

A. Why, nothing more than it had been our custom of assessing them as I told you.

Q. No, I want to know of you, Mr. Fife, if you had any idea of your own as to what this group of mines, or any of them was worth?

368 A. No sir, I did not.

Q. I will ask you this, if you had owned those claims in 1901, would you have sold them for the amount they were assessed by you at?

Mr. JUDSON: We object to that; that is purely speculative.

Mr. CLARK: That is getting at the cash value.

The COURT: That objection to that question will be sustained.

Q. Do you know, Mr. Fife, whether the amount at which you assessed those claims in 1901 would have been considered a full cash value of them at that time?

Mr. JUDSON: Well, the same objection to that question.

The COURT: The question may be answered.

Q. Answer the question?

A. Why, I don't know, I was no mining man, and had no idea about that.

Q. Well, this is the question, in view of the fact that it was your business to find out, I am assuming that you did know; I am asking you that question fairly?

A. If they were worth——

Q. If you think that the amount that you assessed those claims in 1901 was the full cash value of them?

A. No, I don't think it was the full cash value of them.

369 Q. Do you think it was one-half of the full cash value of them at that time?

A. Well, I don't suppose it was.

Q. Do you think it was one-tenth of the full cash value at that time?

A. That question I could not answer.

Q. I am asking you for your best judgment and opinion on it?

A. I don't know; I could not give you any opinion, because I am not familiar enough with the mines to know anything about that in that regard.

Q. Can't you tell me whether in your judgment during the year 1901 that these claims were assessed at less than one-tenth of what they were worth?

A. They might have been.

Q. How is that?

A. I don't know; I don't know what the value of them was, when you come down to a tenth of the value of them, you come to a question I can't answer truthfully, because I didn't know what the value of the mines were.

Q. I will put it this way, do you believe that they were worth more than ten times as much——

Mr. ELLINWOOD: That is objected to, and object to the further cross examination, on the ground that the witness has not shown himself qualified to testify as to the value at all. He says he don't know anything about the mines.

370 The COURT: The objection will be sustained. The witness may testify to what he did or what he knows, but his reasons or his opinions, it is not proper.

Q. Did you know anything about the value of the Holbrook mine in particular for the year 1901?

A. I did not.

Q. Are you able to say whether it was worth more than you assessed it at; that is to say, the sum of five dollars per acre?

A. Why, I presume it was worth more than that; it was not probable that it was assessed at its full cash value.

Q. Didn't you know it was worth vastly more than that, and didn't you know it was then?

A. It was worth more than it was assessed at, yes.

Q. A great deal more than it was assessed at?

A. What more, I don't know; I never dealt in mines any; never bought a mine or sold one in my life.

Q. As to the Silver Spray, wasn't that claim worth a good deal more than you assessed it at?

A. I presume it was.

Q. And wasn't the Dividend also worth a good deal more?

A. The Dividend, I suppose it was.

Q. And the Copper Queen?

371 A. I suppose so.

Q. And the Copper Jack?

A. The Copper Jack, I don't know exactly where it is located.

Q. And the Atlanta?

A. Well, I don't know where they were located; I don't remember just the location.

Q. The Rucker?

A. Nor the Rucker, I don't remember anything about it.

Q. The Baxter?

A. That I don't remember.

Q. And you made no effort to ascertain the value of any of those claims except as it was turned in to you by Mr. Douglas?

A. No sir.

Q. You didn't swear Mr. Douglas to that?

A. No sir.

Q. And you put it on the assessment roll without even the oath of the owner to support the assessment?

A. Yes sir.

Q. And without investigation of your own as to the value of the property, or whether it all had been returned?

A. Yes sir, that had been the custom, and I followed the custom of my predecessor.

372 Q. Do you remember whether you took an oath of office when you took the office of assessor?

A. If I did?

Q. Yes sir.
A. Yes sir.
Q. You did?
A. Yes sir.
Q. You are familiar, Mr. Fife, in a general way with the group of mines owned by the Copper Queen, and worked by them during the year 1901?
A. You say, worked by them?
Q. I say, you are familiar in a general way; you knew they were there, and you know about what operations they had had?
A. Yes sir.
Q. You knew there was a large smelter there?
A. Yes sir, I knew there was a smelter there.
Q. And there was a thousand or two of men working down there in the mines and the smelter and perhaps more?
A. Yes sir.
Q. And that the town of Bisbee consisted principally of the Copper Queen business, and its employees and operators?

Mr. ELLINWOOD: We will object to that.

373 Mr. CLARK: I am trying to show what the class of property was, that is all. I think I have a right to do that.

Q. Now, do you know of any other group of mines in the County of Cochise that year that compared at all with the Copper Queen group in the respects I have mentioned?

Mr. JUDSON: Now, we object to that; that is not the question; it is not a question of a group of properties in the enforcement of this back tax law.
Mr. CLARK: It is a question of class, that is all.
The COURT: Objection sustained.

Q. Do you know of any other claim like the Holbrook, in which that big smelter was being operated in part from in Cochise County that year?

Mr. JUDSON: I don't know of any evidence in the record of any smelter being operated from one particular mine.
The COURT: The objection to the question will be sustained.

Q. Do you know of any other mining concern that was in Cochise County for the year 1901 that compared at all with the Copper Queen?

Mr. JUDSON: Now, we object to that, not only as a group, the personal property, merchandise and everything else, but it calls for an opinion.
The COURT: The objection will be sustained.

374 Q. Do you know of any other mine or mining claim in Cochise County during the year 1901 that compared with the Holbrook in value or output?

Mr. JUDSON: We object to that. What is the standard of comparison? It takes an expert to compare mines.
Mr. CLARK: These are matters of common knowledge.

The COURT: If the witness knows enough about the mines he can answer the question.

Q. What do you say, Mr. Fife; do you know?

A. I am not very well, was not at that time, very well posted on mines, but I don't know of one, no.

Q. Well?

A. There was the Pearce Mine over at Pearce that was running at that time.

Q. And did you know whether it compared with the Silver Spray?

A. No, I did not.

Q. Or the Dividend?

A. I was not familiar with the Dividend, I could not tell you where it is located now, I don't know; the Holbrook, I know where the Holbrook is, and the Spray.

Q. You mention the Pearce mine, do you know what the Board of Equalization for the year 1901 did with the Pea-ce mine?

375 A. I disremember what they raised it.

Q. At what valuation did you return?

A. Five dollars an acre.

Q. You have mentioned the Peace mine as being a mine that they were working during the year 1901?

A. Yes sir.

Q. Now, what other mines, copper mines in Cochise County do you know of that were being worked, and were producing that year?

A. I don't remember.

Q. Do you know of any others that were producing; that is, in the class of what you would call producing mines?

Mr. ELLINWOOD: I submit the standard is not fair; a mine might be a very valuable mine, and not be working.

Mr. CLARK: This goes merely to the one instant of what makes up a class of valuable mines, that is, the question of production; the question of value is depending somewhat on that. We have a right to show.

The COURT: If the witness knows anything about the character and value of the different class of mines in the country, he can testify to it.

Q. Now, I will ask you, Mr. Fife, if you know of any other concern in the County of Cochise during the year 1901 outside of Pearce that you have mentioned that compared with the

376 Copper Queen in the number of men it employed, and in its production, and in its reputed value g-nerally?

Mr. JUDSON: We object to that; it is incompetent and immaterial; it is calling for an expert opinion, and the whole question is confusing and leading, and this is not an expert and not prepared to answer.

The COURT: Objection sustained.

Mr. CLARK: That is all.

Mr. ELLINWOOD: That is all.

Witness excused.

Mr. ELLINWOOD: I would like to ask the witness one more question.

WALTER T. FIFE, being recalled, testified as follows:

Examination by Mr. ELLINWOOD:

Q. Did you assess these properties, these sixty-five patented mining claims of the Copper Queen on any other or different basis than you did any other patented mining claims in the County?

Mr. CLARK: We object to that as a conclusion, and he has already answered.

The COURT: Objection sustained.

Q. Did you know whether any of those sixty-five patented claims had been worked out in 1901?

377 Mr. CLARK: We object; we were precluded from that.

The COURT: Objection overruled.

Mr. CLARK: We object to that because it is immaterial what has happened to these claims since 1901.

Mr. ELLINWOOD: I mean, worked out at that time.

Mr. CLARK: We object to it on the ground it is immaterial for this reason: That if it be sought to show by this line of testimony that there has been an overvaluation of any of these claims by reason of the fact that one or more of them were worked out, and I assume that can be the only purpose of such a line of questions, then we say that such a question cannot be raised by the defendant in this action; that the question of over-valuation can only be determined in the Territory of Arizona in a certain and conclusive statutory method, and one which the defendant has failed to avail itself of, and it has thereby precluded itself from going into the question of valuation in this action.

(Question read by the Reporter, as follows: "Did you know whether any of those sixty-five patented claims had been worked out in 1901?")

A. I didn't know.

Q. That is all.

Mr. CLARK: That is all.

Witness excused.

378 ROGER T. PELTON, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ELLINWOOD:

Q. What is your name?

A. Roger T. Pelton.

Q. Where do you reside?

A. Bisbee, Arizona.

Q. What is your business?

A. Mining engineer.

Q. Connected with the Copper Queen Consolidated Mining Com
pany?
A. Yes.
Q. Are you acquainted with the mining claims in and abou
Bisbee?
A. Yes sir.
Q. Do you know a claim in Cochise County by the name of At
lanta.
A. Yes.
Q. Are you acquainted with the boundaries and extent of tha
claim?
A. Yes.
Q. And its location?
A. Yes sir.
Q. Do you know a claim by the name of Ace of Spades?
379 A. Yes.
Q. Amazon?
A. Yes.
Q. Baxter?
—. ——.
Q. Best Piece?
A. Yes.
Q. Copper Queen?
A. Yes.
Q. Copper Jack?
A. Yes.
Q. Copper King?
A. Yes.
Q. Copper Prince?
A. Yes sir.
Q. Copper Bullion?
A. Yes.
Q. Cumberland?
A. Yes.
Q. Do you know a claim by the name of Dividend Wedge?
A. No.
Q. Is there any such claim in that district?
A. Not that I know of.
Q. Do you know a claim by the name of Ellie Coon?
A. No.
380 Q. Is there any claim in that district by that name?
A. Not that I know of.
Q. Do you know a claim by the name of East Side?
A. Yes sir.
Q. Frank Cogswell?
A. Yes.
Q. General?
A. Yes.
Q. Golden Gate?
A. Yes.
Q. Gardner?

A. Yes.
Q. Gardner?
A. Yes.
Q. Hendricks?
A. Yes.
Q. Hayes?
A. Yes.
Q. Holbrook?
A. Yes.
Q. Howell?
A. Yes.
Q. Harrison?
A. Yes.
Q. Iron Monster?
381 A. Yes.
Q. Little New York?
A. Yes.
Q. Look Out?
A. Yes.
Q. Little Joker?
A. Yes.
Q. Mammouth?
A. Yes.
Q. Malvina?
A. Yes.
Q. New York?
A. No sir.
Q. Neptune?
A. Yes sir.
Q. North Star?
A. Yes.
Q. Ophir?
A. Yes.
Q. Rucker?
A. Yes.
Q. Sun Rise? Two words?
A. No.
Q. Space?
A. Yes.
Q. Surprise?
A. Yes.
382 Q. Silver Spray?
A. Yes.
Q. Silver Bear?
A. Yes.
Q. Sunny Side?
A. Yes.
Q. Sacramento?
A. Yes sir.
Q. Tip Top?
A. Yes sir.

Q. Triangle?
A. Yes sir.
Q. Uncle Sam?
A. Yes.
Q. Wade Hampton?
A. Yes.
Q. Wood Chopper?
A. Yes sir.
Q. White Tail Deer?
A. Yes sir.
Q. Bisbee?
A. Yes sir.
Q. Belle?
A. No.
Q. Isle?
A. No.

Q. Columbia?

383 A. Yes.

Q. Is there any such a claim as Belle or Isle in that district?

A. Not that I know of.
Q. Copper Monarch?
A. Yes.
Q. Copper Crown?
A. Yes.
Q. Copper Globe?
A. Copper Globe, yes.
Q. Hardscrabble?
A. Yes.
Q. Keystone?
A. Yes.
Q. Lucky Jack?
A. Yes.
Q. Raymond?
A. Yes.
Q. Stars and Stripes?
A. Yes.
Q. South View?
A. Yes.
Q. Tack?
A. Yes.
Q. Union?
A. Yes.

Q. Virginia?

384 A. Yes sir.

Q. These mines to which you have testified, mining claims testified about, about how are they situated with reference to each other?

Mr. CLARK: We object; we object, if Your Honor pleases, because the evidence purpose of the question is to show a lack of contiguity; that they are not all together in one group. Now, we say

that the defendant may not prove that these claims are situated otherwise with relation to each other than contiguous, for the reason that they returned them themselves as such, and under the authorities they are bound by the return. They, themselves, have proven that the- valued them in one block and in mass at a uniform price and valuation of five dollars per acre, and that the assessor adopted this, so that they are precluded from showing that the claims are situated otherwise than contiguous. We object for the further reason that the original tax has been paid upon this group of mines as is shown by the records in this case, and therefore it is immaterial.

The COURT: That brings us to a consideration of a question that I consider very important in this case. I examined the pleadings and exhibits last night, but I was wanting to know whether, as a matter of fact, these mines all constituted one group, because I have not seen anything yet which would show me. I know, as a matter of common knowledge, in talking of property, we
385 frequently speak of a group of mines. Now, in this exhibit, the exhibit speaks of sixty-five patented mines, and then I believe it goes on and enumerates sixty-seven. The complaint speaks of sixty-five patented mines, and I believe enumerates sixty-six. The assessment roll speaks of sixty-five patented mines, and names sixty-eight, but there is not anything showing whether these mines constitute one group or two groups, or whether there are some mines standing off to themselves. The correct acreage of the mines are given as six hundred and thirty-six acres. I can't find how they are divided. I don't find anything in the pleadings or the exhibits which show me how many acres any one mine mentioned here contained, consequently I don't know, or can't see where the proportion of the taxes that any one mine would be subject to, or the proportion of the taxes that any one mine—that would constitute a lien on any one mine can be found. I know it is in the prayer of the complaint a request that this judgment be found upon one and all of the mines mentioned, and——

Mr. CLARK: On which taxes are due.

The COURT: And I find that some of the mines mentioned in the exhibit have not been assessed; they do not appear upon the assessment roll. I find that some of the mines that are upon the assessment roll do not appear in the complaint, and I find that there are some mines assessed in the assessment roll that are not mentioned
386 in the exhibit, and I believe not mentioned in the complaint, so that I have been at a loss to know just what tax is being paid. Now, I find in the complaint that the tax amounted to a certain amount, and that on a certain date so much money was paid, and on another date, so much money was paid, and I don't see anything that designates what was paid at that time other than the partial payment of the entire amount of tax due. In other words, I can't see that any of that money was paid as a tax on certain mines, or *on* certain personal tax, or on a certain valuation, or that it was applied to such, and I was going to ask when an opportune time came to do so, to direct my attention to that feature of the case.

(*Argument of Counsel.*)

The COURT: They make the following allegation in the complaint: "That prior to the first Monday in June A. D. 1901 the County Assessor of Cochise County duly listed all of the property of the Copper Queen Consolidated Mining Company owned by said company in the county of Cochise on the first Monday of February, 1901 and assessed the same at sums aggregating the sum of $368,139.76, and that said list included many other things, and the following items assessed at the following amounts", and then giving the exact claims mentioned in *in* the assessment roll, and
387 winding up with this allegation: "six hundred and thirty-six acres of land."

Mr. CLARK: Now, that same action was pursued down to the time of this alleged compromise, and there never was an intimation in this whole proceeding that these claims were otherwise than as a contiguous and solid group, and now after having returned those claims in that way by name and by acreage in such a way that the assessor accepted it as a group, and a connected group, after having paid tax upon it upon that basis without protest, and without any intimation that there was anything wrong, and after pursuing this action in equity down to its conclusion without any such suggestion, they come in here in this action and say that these claims were not contiguous. We say they may not do that at this time. It is unequitable. It was a good enough assessment for them when they made the figures of the assessment, and it was a valid and legal assessment. When they told the Assessor of this county what to put these claims on the assessment roll at, there was no complaint as to the validity of the assessment. It was their own, and they followed it until they conflict with somebody else's figures as to the value of these claims in controversy, and then they say for the first time that it is not a good assessment and these claims are not in one group.

388 The COURT: There is this difficulty when it comes to the Court. I am not satisfied that I find anything in the pleadings or exhibits, so far as they have gone, to show these to be a group, and even if it does constitute a group, I don't know that I am released from the difficulty. Now, if you take it as separate tracts—for instance, I have three farms or three orchards, and I give them to the Assessor as ninety-five acres, I am entitled to pay the taxes on either of those and let the others go, or if they sold, I am entitled to redeem one, and not the others. Now, they are located in different places; one is in Section Three, and one is in Section Four and one in Section Five. Now, you can't divide ninety-five by three and put a third of that tax on the orchard that lays in Section One, and two-thirds on the ones that lay in Sections Two and Three, if one of my orchards has forty acres in it and another fifteen, and the balance in the two others. Now I find in this case that the average is nine acres and a fraction. That is, if there is sixty-five mines. If there are established sixty-six as shown by another paper, it would be something less, and if there would be sixty-eight, there would still be less,

but I have not anything to indicate that these mines are all of the same size.

It is possible, and highly probably that some of them will have twenty-three one-hundredths of an acre, and others will have twenty acres—there can't any of them have more than twenty acres,
389 but they are evidently mines of irregular size and shape with different acreages, and there is not anything here to indicate what the acreage is, and I don't see how you can dispose of that matter as to giving a judgment that will be a lien upon the property of the several mining claims.

Mr. CLARK: May I suggest?

The COURT: Yes.

Mr. CLARK: I thought possibly we had made it clear as to our position in this matter, but I don't believe very much has been said about it when I stop to think. Our position is that whatever the original tax may have been upon this group of claims, that it has all been paid and satisfied and discharged, and the proof already before Your Honor will demonstrate that, and that it was paid by the defendant for the very purpose of discharging the original tax, and perhaps a little something more than that has been paid than will constitute the original tax. At least, the county has received the attorney's fees, and that was not included in the original tax. Now, whatever may have been the condition originally as to the difficulty of ascertaining how much tax was levied against each particular tract comprising these six hundred and thirty-six acres have been eliminated by the conditions here, by the defendants, by accepting it, and then paying the taxes on it, and thus releasing it of the lien in so far as the original tax is concerned. Now, the only claims
390 which have been at all changed since the original assessment are the Holbrook, the Silver Spray, the Dividend, the Copper Queen, the Copper Jack, the Atlanta, the Rucker and the Baxter, and there is no controversy here only the valuation added to these claims by the Board of Equalization.

Col. HERRING: Do you mean that as a lien upon all the other mines?

Mr. CLARK: No sir, we are not, and I am obliged to the counsel for the suggestion, we do not propose to ask for a foreclosure upon any except those mines on which there remains an unpaid tax, and those are the ones, the names of which I have just suggested. We propose to amend the prayer of this complaint, and we propose to ask this Court to foreclose the lien for the taxes remaining unpaid on those particular claims. You can call it a raise of the original assessment, or anything, I don't care what you call it, whether it was much or little, the tax.

The COURT: If that amendment should be made, it would release the Court, it would release the Court from that dilemma, and perhaps only leave the question of whether there was an original and valid assessment made.

The hour of twelve o'clock, noon, having arrived, the further hearing of this cause was continued until 1:30 o'clock this afternoon.

391 TOMBSTONE, ARIZONA,
WEDNESDAY, *November* 25, 1908, 1:30 o'clock p. m.

ROGER T. PELTON, cross-examination continued:

(Question read by the Reporter as follows: "These mines to which you have testified, mining claims testified about, about how are they situated with reference to each other?")

The COURT: I think I will rule on the objection; you object to the question?

Mr. CLARK: Yes, we object to the question.

The COURT: The question was objected to, but however it may be answered.

A. Some of them are separated from the others.

Q. Where is the Wade Hampton?

A. On the flat north of Don Louis.

Q. What distance is that from any other claims that you have testified about?

Mr. CLARK: We object to the testimony on account of the Wade Hampton or relating to it, because it is not one of the claims to which any lien is sought by plaintiff to be foreclosed on that.

Mr. JUDSON: The relevancy of the testimony is not determined upon the plaintiff's theory of the case, but by any theory of either party in the case, and we have a right to the testimony.

392 The COURT: Upon the theory that it may possibly be material, I will let the question be answered.

(Question read by the Reporter as follows:

"Q. What distance is that from any other claims that you have testified about?")

A. It is about twelve hundred feet from the Copper Jack.

Q. Is that the nearest claim of those you have testified about?

A. No, the White Tail Deer is about fifteen hundred feet.

Mr. CLARK: We object to any testimony relating to the White Tail Deer Mine for the same reason.

Q. Your statement is that the Wade Hampton is separated from the other claims?

A. Yes sir.

Q. To what extent?

A. Fifteen hundred feet from the White Tail Deer, and about twelve hundred feet from the Copper Jack.

Q. Now, I would ask you where is the White Tail Deer with reference to any of the other claims?

Mr. CLARK: Same objection.

The COURT: The question may be answered.

A. It is about thirty-five hundred feet from the Lucky Jack.

393 Q. Is it connected in any way with any of the other mines?

A. No.

Q. How far from the Wade Hampton?

A. About fifteen hundred feet.
D. Do you know the claim Hardscrabble?
A. Yes sir.
Q. Where is that?

Mr. CLARK: Same objection.
The COURT: Same ruling.

A. About three hundred feet from the Virginia.
Q. How far is that from the Wade Hampton?
A. It is about a mile.
Q. Is that joining any of the other claims?
A. No sir.
Q. Any mining claim in regard to which you have testified?
A. No sir.
Q. What is the next claim to it?
A. The Virginia.
Q. How far is that away?
A. That is three hundred feet.
Q. Are any of those three claims that you have testified about, the White Tail Deer, the Hard Scrabble or Wade Hampton joining with any of the other claims?
A. No sir.
394 Q. Then the list of claims which I read you are not situated in a group?
A. No sir, they are not all in one group.
Q. But separated, some from each other as far as twelve hundred feet?
A. Yes.

Mr. CLARK: We object to that; it is a conclusion of the witness.
Mr. ELLINWOOD: It is not a conclusion; it is a fact.
The COURT: Objection sustained to that.
Mr. CLARK: We ask now that all of the testimony relating to the lack of contiguity of the claims mentioned by the witness be struck out, for the reason that the defendant having elected to turn in these claims as a group at the aggregate number of acres and at a stated price per acre, precludes him from now showing that they are otherwise than as a group, and for the further reason that the testimony is intended to furnish the foundation for the theory of an over-valuation, and which I assume, an over-valuation is a question that cannot be tried by the Court at this proceeding, the defendant not having pursued its statutory rights in this regard.
The COURT: Motion denied.

395 Cross-examination by Mr. CLARK:

Q. You have testified about all of the claims of the Copper Queen in this case; do you know who owns those claims?

Mr. ELLINWOOD: We object to that: the record is the best evidence, and the assessment roll set out in the complaint may not be added to or taken from by the documentary evidence, and it cer-

tainly may not be taken from or added to by the oral testimony of the witness.

The COURT: I think the objection is good.

Mr. CLARK: I won't press it. I will ask that the record show that the question was withdrawn.

Q. For whom have you been employed for the last two years?

A. The Copper Queen.

Q. Did you gain your familiarity with the claims that you have testified about, or the mines that you have testified about by reason of your employment with the Copper Queen Company?

A. Yes sir.

Q. And not otherwise?

A. No sir.

Q. You testified that the Wade Hampton and two other claims were apart from the others, do you mean by that to say that the others except the three that you have mentioned are in a group and contiguous; that all the other claims mentioned by you are connected?

396 A. Why, I think they are.

Q. That is all.

Mr. ELLINWOOD: That is all Mr. Pelton.

Mr. ELLINWOOD: I would like to ask Mr. Pelton one question more. No, never mind. We will call Mr. Douglas.

WALTER DOUGLAS, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ELLINWOOD:

Q. Please state your name?

A. Walter Douglas.

Q. And your residence?

A. Bisbee, Arizona.

Q. And occupation?

A. Superintendent of the Copper Queen.

Q. What was your business on the 17th day of July, 1901?

A. I was Superintendent of the Copper Queen Consolidated Mining Company.

Q. Did you know the Copper Queen Mine, called the Copper Queen Mine that time?

A. I did.

Q. I will ask you, Mr. Douglas, whether any ore had been taken from that mine during the year prior to July 17th, 1901?

397 Mr. CLARK: We object, if Your Honor pleases for the reason that the purpose of the question evidently is to elicit testimony tending to show the value, rental value of this particular mine of the Copper Queen. We say that such testimony is inadmissible on behalf of the defendant for the reason that the question of whether this property has been over-valued is not triable in this

Court in this proceeding; that there is a special and statutory proceeding, and was a special and statutory proceeding open to the defendant during the year 1901 within which to try this question; that such method is conclusive under the statute, and for the further reason that prior to the time when this statutory method that I have alluded to became available to defendant, it elected to bring an action in this Court known as suit No. 2239 to restrain the tax collector of this county from collecting the very tax sought to be recovered in this action, and that it elected not to press that suit to final judgment, and that was the action in which the question might have been tried if the defendant had sought to do so and for these reasons we say that the testimony sought to be elicited is immaterial, and we object to it.

Mr. JUDSON: We offer this in support of the contention that this was not the exercise of lawful action in the premises, but was
398 arbitrary. Now, suppose it should appear that all of the mines had no value, would we not be allowed to show that. We have a right to give one at a time.

The COURT: I am not prepared at this time to say that the defendant did not have the right to direct the action taken by it. I see that on the papers here in this case, this evidence would not be competent, and should be excluded. On the defendant's theory of this case, I think the evidence would be competent. I have listened to the presentation of the two theories, but I have not definitely ruled on them yet. The laws of the territory of 1901 prior to February permitted a certain course to be pursued, and provided for the mode of procedure. The defendant proceeded under a form, as they claim in their pleadings, they dismissed that proceeding upon the belief that the matter had been definitely settled and compromised. How long they remained in that view has not been determined, nor has there been anything in the case to show when it was placed upon them the duty to take any step to provide for those acts, and if the theory of the defendant should be sustained, and they be permitted to show that the raise was a raise fraudulently made without the right by the Board of Equalization, this evidence is in line to support that theory. In that view of the case, I will let this testimony go in, and if the one theory is adopted, it will be considered for what it is worth, and if the other is adopted, it will be stricken out.

399 Mr. CLARK: Let me suggest this to Your Honor. Your Honor's suggestion that it not appearing in the record how long the defendant remained in the belief that this compromise was legal, and therefore he did not perform a duty which was devolved on him under the circumstances, I have this to say. Defendant is supposed and was supposed to know the law. It was represented by capable and able counsel; there is no question about that. The record shows that this so-called compromise, or the resolution regarding it, was signed by the leading counsel for the defendant, Colonel Herring, so it cannot be assumed that the defendant was ignorant of the law, therefore, from the very moment that this com-

promise was entered into, as a matter of law, it was known to the defendant that it was illegal and void. The statutes of Arizona at that time held out no authority to any Board of Supervisors to take any such action as that, and even a lawyer much less learned than Colonel Herring would have known that, and did know it, so that the legal knowledge that this was a void agreement that was entered into was forced upon them from the moment it was suggested, and they are bound by that legal knowledge, therefore, no matter how long the territory may have waited before it brought any action to question this particular tax, they were aware of the law all the time, and knew that they were resting upon a foundation that had no support in law.

400 The COURT: Proceed with the witness; objection overruled.

(Question read by the Reporter as follows: "Q. I will ask you, Mr. Douglas, whether any ore had been taken from that mine during the year prior to July 17th, 1901?")

Mr. CLARK: We object for the further reason that that does not tend to show whether the mine was over-valued or under-valued; the fact whether any ore has been taken out. That is not the question; the question should be considered as to the value of this property.

Mr. ELLINWOOD: I think that will appear.

The COURT: I suppose that is a preliminary question.

Mr. ELLINWOOD: Yes.

The COURT: Proceed.

A. None.

Q. Why?

Mr. CLARK: The same objection.

The COURT: Same ruling.

A. Why? Because the mine was considered to be worked out; no ore in sight to take out.

Q. How long before that had any ore been taken out approximately?

A. Not for a couple of years, during my tenure there in charge of the mine.

401 Q. Giving that the Copper Queen Consolidated Mining Company was a solvent debtor, what would you be willing to take the Copper Queen for in payment of a just debt?

Mr. CLARK: Same objection; it goes to the question of valuation.

The COURT: Overruled.

A. Why, I could not say as a mine. I would consider it valueless.

Mr. CLARK: Now, we ask that that be stricken out, because the qualification "as a mine," that is not the question.

Mr. JUDSON: That is what it is assessed as.

Mr. CLARK: It is assessed as a property, and we don't want any qualification of it as a mine or a tract of land, but whether the Copper Queen, without any qualification not as a mine considered it worth.

The COURT: The objection will be sustained.

Q. What do you mean by that qualification, Mr. Douglas?

Mr. CLARK: We object to that question, and ask that it be not permitted to be put.

The COURT: He can testify as to the value of the mine, the actual cash value of the mine.

Q. From the evidence introduced by the plaintiff, it is shown that the Copper Queen appears upon the list as raised by the
402 Board of Supervisors to the sum of fifty thousand dollars that much of the value; what was it added to?

Mr. CLARK: I don't think that would make any difference.

Mr. ELLINWOOD: I will let you figure that out.

Q. Given that the Copper Queen Consolidated Mining Company was a solvent debtor, would you be willing to take the Copper Queen Mine in payment of a just debt in the sum of fifty thousand dollars?

A. No.

Mr. CLARK: Just a moment; the witness answered just a little bit hastily. We object, because the question assumes the value of the mine at this time.

Mr. ELLINWOOD: No, at that time. I will modify it. At that time. I will state to counsel, in all these questions I am referring to that time, on June 17th, 1901.

Mr. CLARK: All right; so that we understand that you are.

Q. In what sum would you have been willing to have taken the same in the payment of a just debt?

Mr. CLARK: We object to that.

Mr. ELLINWOOD:

Q. If any?

Mr. CLARK: We object to that, if Your Honor pleases, because there is no foundation for it in the pleading, and we must
403 assume that the witness would not have taken it for fifty thousand dollars; that he would have taken it for one cent less than that, and counsel cannot prove otherwise, because they have not alleged the value of that kind in their pleadings. Now, under the rule, as I quoted the authorities yesterday, that is a mere conclusion of law that it was over-valued, otherwise this witness may not, in behalf of the defendant, be permitted to say what he considers the value of that mine to be, or how much less he would have accepted it at from a solvent debtor. Now, that is clearly settled by all the authorities, even by the one counsel relies upon, the Chicago Traction Company case.

The COURT: On the defendants' theory that there has been an unlawful discrimination, I think this evidence can go in for the purpose of showing that discrimination, and for no other purpose. The objection is overruled.

(Last question read by the Reporter as follows: "Q. In what sum

would you have been willing to have taken the same in the payment of a just debt, if any?")

A. I consider the Copper Queen Mine valueless.

Q. Do you know the mining claim called the Silver Spray?

A. I do.

Q. At that time, June 17th, 1901, thereafter were there hoisting works on that claim?

404 A. There were.

Q. Do you know the Holbrook Mine?

A. I do.

Q. Were there any hoisting works on the Holbrook?

A. No.

Q. Now, coming to the Copper Jack Mine, do you know the Copper Jack?

A. I do.

Q. Given that the Copper Queen Mining Company was a solvent debtor, what would you be willing to take the Copper Jack for in the payment of a just debt?

Mr. CLARK: We make the same objection to the same question asked of the witness in relation to the Copper Queen.

Mr. JUDSON: Meaning 1901.

Mr. ELLINWOOD: Yes; it all refers to 1901?

The COURT: The question may be answered.

A. I don't consider that the Copper Jack had any value.

Q. At that time?

A. At that time.

Mr. CLARK: The Copper Jack with all its surface improvements of every kind?

Mr. ELLINWOOD: You can cross examine.

Mr. ELLINWOOD: I object to the question on that ground that it is a qualified answer, and it is not responsive to the question.

405 Q. Do you know a mine called the Rucker Mine?

A. Yes.

Q. Given that the Copper Queen Company was a solvent debtor, what would you take that for in the payment of a just debt at that time?

Mr. CLARK: As it stood.

A. Well, I could not say exactly; it was practically a worked out mine, but there were still a few men working in it cleaning it out.

Q. Well, would you have taken that in payment of a just debt for twenty thousand dollars?

Mr. CLARK: We will object for the same reasons stated in the former question, and because we do not think it is fair to ask this witness what he would take it for; it is not a question of what Mr. Douglas might have been willing to take this mine; it is a question of what it may have been accepted at.

The COURT: What its cash value was at that time; what a reasonable, prudent business man would have taken it for at that time.

A. Take the Atlanta; do you know the Atlanta?
A. Yes.
Q. On June 17th, 1901, what was its condition?
A. There was no ore being extracted from the Atlanta.

406 Mr. CLARK: We object.

A. It was a worked out mine.
Q. What is that?
A. It was a worked out mine as far as we knew.
Q. What would you, giving that the Copper Queen Company was a solvent corporation, what would a reasonably prudent man have accepted that mine in payment of a just debt?

Mr. CLARK: That is better.

A. Well, can't say; I would consider it valueless.
Q. Do you know the Baxter Mine?
A. I do.
Q. What was its physical condition on June 17th, 1901?
A. It was practically worked out.
Q. Given that the Copper Queen Consolidated Mining Company was a solvent growing corporation, what would a reasonably prudent man accept that for in the payment of a just debt?
Mr. CLARK: At that time?
Q. At that time?
A. Well, it would have been worth a small sum of money for the amount of ore that was left.
Q. Can you state, or let me put it this way: What would a reasonably prudent man have accepted the same—would a rea-
407 sonably prudent man have accepted it in payment of a just debt against the Copper Queen Company of two hundred and fifty thousand dollars?
A. No.

Mr. CLARK: I would like to have the record show that the same objection goes to all of these questions, and I will not repeat it several times.

Q. Take the Silver Spray Mine, given that the Copper Queen Consolidated Mining Company was a solvent corporation on June 17th, 1907-1901, would a prudent, reasonable man have accepted the same in the payment of a just debt in the payment of a debt of one million dollars?
A. I don't think so.
Q. Take the Holbrook Mine, giving that in June, 1901, the Copper Queen Consolidatel Mining Company was a solvent debtor, would a reasonable man and prudent man have accepted the same—

The COURT: That is hardly the question. A prudent business man it should be.

Q. Given that the Copper Queen Consolidated Mining Company is a solvent corporation on June 17th, 1901, would a reasonably prudent business man have accepted the same in payment of a just debt in the sum of one million dollars?
A. No.

Q. Mr. Douglas, you stated that your business was at that time Superintendent of the Copper Queen Consolidated Mining Company?

408 A. Yes, sir.

Q. What experience did you have in the mine?

A. Why, I had been directing the mining business for the past eleven years.

Q. At that time you had charge of these properties of the company?

A. Yes.

Q. And was familiar with them?

A. Yes, sir.

Q. And the underground workings?

A. I was.

Q. And what ore bodies there were in sight?

A. Yes, sir.

Q. You feel yourself competent to testify to the ore bodies and the values?

A. I do.

Q. I hand you, Mr. Douglas, Plaintiff's Exhibit "A;" I will ask you if that is your signature at the bottom of that paper?

A. It is, yes.

Q. I will ask you to state whether, if it reads "subscribed and sworn to before me this second day of July, 1901. Walter T. Fife, Assessor," if in fact, you on the 7th day of July, 1901, or at any time or at all ever swore to the same before Mr. Fife?

Mr. CLARK: I object to that; the witness says it is his
409 signature, and his testimony tends to impeach a record. We object; we don't believe that the witness can be heard to say six years after he signed that that he did not swear to it; it is signed as an affidavit.

Mr. ELLINWOOD: You have heard him say so.

Mr. CLARK: No, I object to the answer. Here is his statement "I, Walter Douglas do solemnly swear," that is his record and his oath and his signature, and we say he may not be permitted to come into this Court and say that he did not swear to that.

Q. Mr. Douglas, will you please state the circumstances under which you did sign that paper?

Mr. CLARK: We object; it is immaterial under what circumstances he signed it; it purports to be his oath, and his signature.

The COURT: A man who signs a piece of paper and identifies his signature as his signature, and it is followed by the certificate of some one else that he swore to it, he can show whether he did swear to it or not; the objection will be overruled.

Q. What is your answer?

The COURT: Answer that question whether you swore to that paper?

A. I did not.

Q. I will ask you, Mr. Douglas, if, in the year 1901, and prior

thereto you were familiar with the custom and method of assessing patented mining claims in the County of Cochise?

410 Mr. CLARK: We object; the witness is neither the Assessor nor one whose duty it was to value any kind of mines for assessment in the County of Cochise, and it is immaterial whether he knows or don't know, and for the further reason if there was any custom as to the assessment of mining claims in the County of Cochise, it would appear of record.

The COURT: The question may be answered.

(Question read by the Reporter, as follows: "Q. I will ask you, Mr. Douglas, if, in the year 1901 and prior thereto, you were familiar with the custom and method of assessing patented mining claims in the County of Cochise?")

A. I was.

Q. What was that custom?

Mr. CLARK: Same objection.

Q. The custom was to assess all patented mining claims at five dollars per acre.

Mr. CLARK: I move that that be stricken out. It was answered before the Court ruled.

The COURT: Same ruling.

Q. How long had that custom prevailed in this county prior to 1901?

Mr. CLARK: Same objection.

The COURT: Same ruling.

A. It had prevailed from the time I was Superintendent there to my certain knowledge.

Q. How many years was that?

411 A. Three years.

Q. And will you state whether or not that custom was acquiesced in uniformly by the mine owners of this county?

A. It was.

Mr. CLARK: That is objected to as calling for the conclusion of the witness.

The COURT: Unless the witness knows.

Q. Do you know?

A. I know that it was by a part of the mine owners; I don't know whether it was by all of them.

Q. Do you know anything about the custom that existed throughout the Territory, in other counties?

A. I do.

Mr. CLARK: We object for the reason that it assumes that the custom did exist, without having elicited any testimony to the fact; the question assumes that the custom to which the witness has testified prevailed in other counties.

Q. I will ask you a preliminary question. Do you know, Mr.

Douglas, whether a custom existed in reference to the assessing of patented mining claims in other counties throughout the territory?

Q. I do.

Q. What was that custom?

412 Mr. CLARK: We object for the same reasons already given.

The COURT: Same ruling.

A. The custom was in ten of the other counties of the territory to tax patented mining claims on a similar basis as that of Cochise County, and the other two counties were exceptions.

Q. You may examine.

Cross-examination by Mr. CLARK:

Q. Mr. Douglas, will you state in what two counties the exceptions existed that you refer to?

A. Yavapai and Graham.

Q. Yavapai and Graham?

A. Yes, sir.

Q. And in all other counties I believe you say the custom prevailed of assessing patented mines at a valuation of five dollars per acre?

A. No, on a small valuation per acre; it varied. I don't think any of them exceeded five dollars, if my recollection was correct, before that system was adopted of an arbitrary valuation.

Q. It was an acreage?

A. Acreage valuation.

Q. What it was an acre or less?

A. Yes, sir.

413 Q. Now, are you able to say why the exception existed in Yavapai and Graham Counties that you have spoken of?

A. No, I am not.

Q. Well, I will ask you if it is not a matter of common knowledge it existed because in each of those two counties there were one or two very large producers of copper, isn't that the reason why a different system prevailed in those counties?

A. I am not familiar with the valuation; I don't remember now that it was put on the mines in Yavapai County, but I am familiar with Graham County, and the method of assessing there. They had an arbitrary value, which was varied from five to ten thousand dollars on certain large producing claims of producing companies there, picking out three or four claims of each company, and *the* ignored all the other claims.

Q. And aside from those three or four mines on an acreage basis, did it not, even in those counties of assessing all the other patented claims on an acreage basis, did it not, even in Graham county?

A. I think so.

Q. Now, in Yavapai County, are you able to state that the same rule prevailed there?

A. No, I don't remember about Yavapai County.

414 Q. Do you know *know* that the mines or certain specific claims of the United Verde Company were selected, and a valuation other than on an acreage basis placed upon them?

A. Yes, sir.

Q. Now, I will ask you if you don't know of your own personal knowledge that the reason that this exception existed in Graham County and Yavapai County was because they were applied—or those exceptions were applied to mines that were producing large quantities of copper?

A. Why, I only know that the information was given me, and not the reason of such an application.

Q. I ask you if you don't know of your own knowledge that those mines that were selected were producing large quantities of copper?

A. Yes, sir.

Q. Both in Yavapai and Graham Counties?

A. Yes, sir.

Q. And do you know of any other mines than those mentioned in Yavapai and Graham Counties that were producing large quantities of copper at that time, or any quantitiy of Copper for that matter?

A. Yes, sir.

Q. That were assessed on an acreage basis?

A. Yes, sir.

Q. Any considerable quantity?

415 A. Quite considerable, yes sir.

Q. Having smelters and all that sort of thing?

A. Selling their ore.

Q. Shipping their ores?

A. Yes, there was one with a smelter too.

Q. Will you mention that?

A. There was a mine in Graham County, the Shannon Mine, a producing mine and selling its ore to the Arizona Copper Company.

Q. Well were they, the Shannon Company, assessed on an acreage basis?

A. Yes sir.

Q. For what years?

A. When I was up there it was in 1897 and 1898.

Q. I am confining this to the year 1901?

A. Well, I was giving you my experience in Graham County while I was there, while the information I have from Graham County was in the year 1901, but I can't say from my personal knowledge whether there were other mines producing that were simply on an acreage basis for that year.

Q. So that in the year 1901 of your own personal knowledge, you know of no other claims save the United Verde in Yavapai County, and the Graham County mines that you have mentioned and

416 this property here in Bisbee of your own that were assessed otherwise than upon an acreage basis?

A. Yes, I think the Cross was in Yavapai County.

Q. You won't be certain as to that will you?

A. No, I will not.

Q. I know a little something of that myself, and I think it is not. Now, as to Cochise County in 1901, what other mines outside of the

mines owned by the Copper Queen, patented mines, not unpatented, were producing copper in large quantities during that year?

A. Well, there were several producing mines.

Q. Well, by "producing" I mean in large quantities; considered heavy producers?

A. Well, the Peabody was considered a heavy producer.

Q. About what amount of copper did it produce for the year 1901?

A. I could not say.

Q. Well, can't you approximate it roughly; I don't ask you to state it with any accuracy.

A. No, I would not presume they were shipping more than a car load a week of ore.

Q. Beg pardon.

A. I would not presume they were shipping more than a car load a week of ore.

417 Q. A car-load of ore a week?

A. Yes sir.

Q. Did they have a smelter upon their property?

A. No sir.

Q. Any other producing mines that you know of in Cochise County for that year? 1901?

A. I think they were shipping from Dos Cabezas.

Q. Dos Cabezas?

A. Small shipments.

Q. No smelter there?

A. No.

Q. Can you give me roughly the amount of ore that they were shipping?

A. I could not at this time.

Q. Was it more or less, as you recall, than the Peabody?

A. No more.

Q. No more?

A. No sir.

Q. Now, you spoke about what the production of the Copper Queen Mines were?

Mr. ELLINWOOD: I object, may it please the Court. He can't ask what the value of any particular mine is.

The COURT: Let the question be answered.

Q. You may answer Mr. Douglas.

418 Mr. DOUGLAS: What one was it?

Mr. CLARK: The Copper Queen group was the question.

(Question read by the Reporter as follows:

"Q. Now, you spoke about what the production of the Copper Queen Mines were?")

A. They were producing in 1901 about three million pounds of Copper a month.

Q. Three million pounds a month?

A. Yes sir.

Q. You stated that the Peabody was shipping about a car of ore

a month—a week. What would that be in tons of copper monthly about?

A. That would be about six tons of copper to the car, or twenty-four tons a month.

Q. Twenty-four tons a month?

A. That would be forty-eight thousand pounds.

Q. And you say the output of the Dos Cabezas did not exceed that?

A. No.

Q. Will you please state, Mr. Douglas, how long that production of the Copper Queen mines that you have mentioned continued prior to 1901 and up to 1901?

Mr. ELLINWOOD: I think that is immaterial.

Mr. CLARK: It merely goes to the custom.

Mr. ELLINWOOD: It is not cross examination.

419 Mr. CLARK: The witness was permitted to testify how long the custom had existed of assessing these mines at a certain price.

The COURT: Let the question be answered.

A. Why, I think the production came up to that figure at the end of 1899 when the new smelter was finished.

Q. 1899?

A. Prior to that it was a little less.

Q. That group has been producing for about how many years approximately?

A. About twenty-eight years.

Q. Your production has always been profitable?

A. No.

Mr. ELLINWOOD: May it please the Court, we did not ask anything about that.

Mr. CLARK: We will withdraw it Mr. Ellinwood.

A. Did you know of any other mines—I think he has answered that?

A. Yes sir.

Q. You mention the Peabody mine, Mr. Douglas, I will ask you if you don't know as a matter of fact that the valuation of that mine was raised by the Board of Equalization in 1901? Raised from an acreage basis to an arbitrary valuation?

A. No, I don't remember it to have been.

420 Q. And I will ask you if you don't also remember that the Dos Cabezas—no, I was mistaken there. The Mammouth?

A. The Commonwealth is the only other mine that I remember having been raised.

Q. You don't remember as to the Mammouth in the Johnson Mining District?

A. No.

Q. May I ask you Mr. Douglas in reference to this affidavit, what fixes it in your memory that it was not sworn to before Mr. Fife?

A. Because I never swore to one before any assessor.

Q. Never did?

A. Never did.

Q. You have turned in schedules like this before?

A. Yes sir.

Q. Will you please state whose handwriting that is above this other, commencing there (indicating)?

A. I think that is Colonel Herring's.

Q. Did you read this, Mr. Douglas, before you signed it?

A. Yes.

Q. And you noted that it was an oath as to the correctness of the statement?

421 A. I did not consider that it was an oath unless it was sworn to. I simply signed the blank that was necessary, as the representative of the Copper Queen.

Q. When did you first discover that Mr. Fife had appended his signature there as though it had been sworn to?

A. When the case came up for trial.

Q. The original case?

A. Yes sir.

Q. That was the first you knew of it?

A. Yes sir.

The COURT:

Q. Can you tell me whether these figures "48, 49 and 50" at that place (Indicating) was placed in there by yourself or by some one before your signature was put there, or afterwards?

A. It is not my writing sir; no sir, I can't identify that writing; the "No. 1" looks like Mr. French's, and the other I don't know at all.

Q. Now Mr. Douglas, in the matter of the improvements on the Holbrook Mine—when you say that the Baxter Mine was practically worked out, and in your judgment would not be taken for a solvent debt of two hundred and fifty thousand dollars, do you mean the Baxter Mine as it stood in 1901?

A. Yes sir.

Q. Including all improvements?

422 A. Yes sir.

Q. And did I understand you that that applies to all of these mines as to the question of valuation?

A. Yes sir.

Q. That the valuation placed upon them includes improvements and everything of that sort?

A. The only mine that is valueless as far as a mine is concerned, which has improvements on it is the Copper Jack, and those improvements were assessed separately.

Q. Yes?

A. And so turned in, and outside of those improvements, any productive value it might have for surface rights, I consider it valueless.

Q. That is all Mr. Douglas.

Mr. ELLINWOOD: That is all.

Witness excused.

Mr. ELLINWOOD: Now, I wish to offer in evidence the records of this Court, the same being the receipt, official receipt of M. D. Scribner, Tax Collector, Treasurer and Ex Officio Tax Collector of Cochise County.

Mr. CLARK: We object to it, if Your Honor pleases.

Mr. ELLINWOOD: Showing the payment of fourteen thousand and some dollars.

423 Mr. CLARK: Now, the receipt offered reads as follows: "Tombstone, Arizona, December 9, 1901. Received of the Copper Queen Consolidated Mining Company the sum of fourteen thousand, one hundred and thirty-three dollars and twelve cents, the same being the amount of taxes upon the property of said company, at the valuation thereof returned by the County Assessor for the year 1901 (including the addition thereto of seventy-three thousand, five hundred and twenty dollars) which said amount of fourteen thousand, one hundred and thirty-three dollars and twelve cents said company concedes to be due, and which is accepted by the County Treasurer and Ex-Officio Tax Collector, on account of any moneys which may ultimately be determined as due from said company for its taxes for said year." Upon reading this, my objection falls; I haven't any objection.

The COURT: Objection withdrawn?

Mr. CLARK: Yes sir.

Mr. ELLINWOOD: I will have it marked as an exhibit, and introduce it in evidence.

(Said paper was marked Exhibit "A5", and was introduced in evidence, and the same is in the words and figures following, to-wit:

EXHIBIT 5A.

"TOMBSTONE, ARIZONA, *December* 9, 1901.

Received from the Copper Queen Consolidated Mining
424 Company, the sum of fourteen thousand, one hundred and thirty-three dollars and twelve cents ($14,133.12) the same being the amount of taxes upon the property of said Company, at the valuation thereof returned by the County Assessor for the year 1901 (including the addition thereto of seventy-three thousand, five hundred and twenty dollars $73,520.00) which said amount of fourteen thousand, one hundred and thirty-three dollars and twelve cents said company concedes to be due, and which is accepted by the County Treasurer and Ex-Officio Tax Collector, on account of any monies which may ultimately be determined as due from said company for its taxes for said year.

[SEAL.] M. D. SCRIBNER,
Treasurer and ex-Officio Tax Collector for Cochise County, Territory of Arizona."

BEN GOODRICH, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ELLINWOOD:

Q. What is your name?
A. My name is Ben Goodrich.
Q. Is it Ben or Benjamin?
A. Ben.
425 Q. And did you know in his life time a man by the name of P. J. Delehanty?
A. Yes sir.
Q. You may state whether or not he is living or dead?
A. He has been proven to have been dead a good many times in this Court. He is dead, and very much dead.
Q. Have you any relation with his estate?
A. Yes sir, I am representing the administratrix, Mrs. Powers.
Q. Do you know whether he is the same P. J. Delehanty who was a member of the Board of Supervisors of this county in the year 1901?
A. I would not know whether he was in 1901, but I never heard of but one P. J. Delehanty.

Witness excused.

Col. HERRING: Thomas York may take the stand.

THOMAS R. YORK, being called as a witness on behalf of the defendant, and having been duly sworn, testified as follows:

Direct examination by Colonel HERRING:

Q. Your name?
A. Thomas R. York.
426 Q. Where do you live?
A. Tombstone.
Q. How long have you lived here?
A. About eight years.
Q. Where did you live in 1901?
A. Tombstone.
Q. What was your business then?
A. I was in the butcher business.
Q. Did you hold any official position in the County of Cochise?
A. Yes sir, I was Supervisor.
Q. And in July 1901, did you sit as a member of the Board of Equalization in Cochise County?
A. Yes sir.
Q. And did you ever examine the Silver Spray, Holbrook, Copper Queen, Copper Jack, Baxter, Atlanta, Dividend or Rucker Mines of the plaintiff, with a view of determining their value? Value of the Rucker Mine of the Copper Queen Consolidated Mining Company?

Mr. CLARK: Don't answer that. We object to it because it is immaterial whether or not he ever examined those properties to ascer-

tain their value for the purpose of assessment or otherwise; it is immaterial; this goes to the question of valuation, of over-valuation of those patented mines for the year 1901, and that is a question which this Court may not inquire into at this time in this proceeding for reasons already stated.

427 Col. HERRING: The very next question will answer the gentleman's question: Did you ever make inquiry to ascertain their value?

The COURT: The objection is overruled.

Q. I will repeat the question to you: Did you ever examine the Silver Spray, Holbrook, Copper Queen, Copper Jack, Baxter, Atlanta, Dividend or Rucker Mines of the Copper Queen Consolidated Mining Company with a view of determining their value?

Mr. CLARK: Now, as a member of the Board of Supervisors, he is not required to make any such examination.

The COURT: On the supposition that other questions following it, I will let it go in.

Q. Did you or not?

A. No, I never did; never caused any examination.

Q. Never caused any examination of those properties made for the purpose of determining their value, did you?

A. No sir.

Mr. CLARK: Same objection.

The COURT: Same ruling.

Q. Did you at that time, when you were acting in the capacity as a member of the Board of Equalization, or Board of Supervisors of Cochise County, know anything of your own knowledge of the value of either of those properties?

428 Mr. CLARK: Same objection.

The COURT: Same ruling.

A. I did not.

Mr. CLARK: It is not required of any Supervisor or any assessing officer to know of his own knowledge.

Q. Now, was there any evidence taken by the Board of Equalization at any meeting in that year of the value of the hoisting works and the improvements on the Holbrook Mine that you now remember?

Mr. CLARK: If Your Honor pleases, we object because the record is the best evidence and must speak. It is presumed conclusively that the Board of Equalization did its duty, and each member is protected by that presumption.

Mr. ELLINWOOD: That presumption is not conclusive upon a motion of this character, and we have a right to show step by step what was done; we can't prove it all at once.

The COURT: The question may be answered.

Q. Do you now remember that there was any evidence taken in re-

lation to the value of the hoisting works and improvements on the Holbrook?

A. I don't remember.

Q. Well now, do you remember whether there was any evidence taken by the Board of Equalization at any meeting of that
429 year of the value of the hoisting works and improvements on the Silver Spray Mine?

Mr. CLARK: Same objection.

The COURT: Same ruling.

A. I don't remember that there was.

Q. If there was any taken, do you now know of it?

A. No sir.

Mr. CLARK: Same objection.

The COURT: Same ruling.

Q. The record, Mr. York, shows that in that year your Board raised or attempted to raise the Holbrook hoisting works and improvements ten thousand dollars. Do you now remember whether you had any evidence upon which you acted in making that raise?

Mr. CLARK: Same objection, and the additional objection that it is leading.

The COURT: Objection overruled.

A. No sir.

Q. Was any evidence taken?

A. No sir, there was not, not before the Board only what Mr. Walter Douglas gave them himself.

Q. How about the Copper Jack; was that the same way?

A. Yes sir.

Mr. CLARK: Same objection.

430 The COURT: Same ruling.

Q. And was that also the case in relation to the Baxter and Atlanta?

A. Yes sir.

Mr. CLARK: Same objection.

The COURT: Objection overruled.

Col. HERRING: We will consider the objection going to each of these.

Q. The Silver Bear and Dividend and Rucker, was the same thing true in relation to those?

A. Yes sir, in all those.

Q. Mr. York, you knew Patrick Delehanty, did you not?

A. Yes sir.

Q. He was a member with you in that year?

A. Yes sir.

Q. At the time of the questions referred to by me?

A. Yes sir.

Q. Do you know whether Patsy Delehanty is alive or dead?

A. Yes sir, dead.
Q. P. J. Delehanty was his name?
A. Yes sir.
Q. P J. Delehanty you say is dead?
A. Yes sir.
Q. Why do you say that?
A. I saw him in his coffin.

431 Mr. CLARK: No questions Mr. York.

Witness excused.

Mr. CLARK: Now, if the Court pleases, we move to strike this testimony of Mr. York out, upon the ground that it is immaterial, irrelevant and incompetent. For this reason, the testimony elicited, is offered for the purpose of proving or tending to prove an over-valuation of the mining claims mentioned, for the year 1901, and we say that this Court in this proceeding may not try that question. We move to strike it out for the further reason that all of this testimony sought to be elicited if admissible at all, is admissible through and by the record and not otherwise, and that parol testimony may not be received, and for the further reason that it is assumed that these Supervisors did their duty, and that it was not brought out or attempted to be brought out that there was no exercise of judgment by the witness, or by his fellow Supervisors.

The COURT: The motion is denied.

Mr. ELLINWOOD: I offer a record of the testimony taken in the trial of the Copper Queen Consolidated Mining Company vs. The County of Cochise, and certificate of the shorthand reporter, and ask to read the testimony of Mr. P. J. Delehanty, under paragraph 2537 of the Revised Statutes of this Territory.

432 Mr. CLARK: Yes, if Your Honor pleases, we object for the reason that the testimony sought to be elicited is inadmissible under paragraph 2537. The statute is that when a witness shall die or be beyond the jurisdiction of the Court in which the case was pending. That is to say, in which Court the testimony of that witness has been taken, and I understand that testimony was taken in No. 2239.

Mr. ELLINWOOD: That is right.

Mr. CLARK: Now, it says in a future trial or subsequent trial had in the same case, the witness may testify. Now, you will bear in mind that that was the case of the Copper Queen Consolidated Mining Company against M. D. Scribner and the County of Cochise and it was settled and dismissed. This is a distinct and entirely different cause of action. This is the cause of action of the Territory of Arizona to collect the delinquent tax from that company, and nothing more, and that was an action in equity. This is strictly a statutory proceeding in rem. The statute will not be enlarged under any law so as to include this testimony.

Mr. ELLINWOOD: Now, may it please the Court, this matter was incidentally touched upon at the former trial of this cause, and Mr. Walter Douglas' testimony was offered in evidence by the Attorney

General, and I objected on the ground, as the record will
433 show, that he was within the jurisdiction of the Court, and incidentally remarked that it was not the same cause of action, and counsel took issue with me, and the Attorney General was undoubtedly right, as I have made an investigation of the authorities since. Mr. Clark's statement at that time was this: "Of course, this is a different situation. This is a recapitulation of the same action. The plaintiff in that action was seeking to restrain the collection of this very tax. Now the Territory is plaintiff, and the county seeks to recover this very tax. Practically the same issues are involved, on one side the plaintiff in that case was seeking to restrain the collection, and now one of the same defendants are seeking to collect it," and I think that the Attorney General very clearly recited the law of the case. The question, of course, has been frequently before the Court, and the likeness of these two cases is evidence from the fact that we have introduced testimony, and the Attorney General has the complaint, the amended complaint, the decree and those exhibits, the original assessment roll, the abstract that went to the Auditor, the affidavits, all the affidavits that was pertaining to the original case in 2239 was presented in this case, and was held to be admissible.

The COURT: The objection will be overruled.

Mr. CLARK: I want to add the further objection that I have
434 noted to all of the testimony of this kind and character, that it goes to the question of valuation.

The COURT: Objection overruled.

(The evidence of P. J. Delehanty was now read into the record of this case from the record in cause No. 2239, the Copper Queen Consolidated Mining Company, a corporation, v. M. D. Scribner, Treasurer and Ex-Officio Tax Collector of the County of Cochise, and the County of Cochise, which said evidence is in the words and figures following, to-wit:

"P. J. DELEHANTY, being first duly sworn, testified on behalf of the plaintiff as follows:

Direct examination by Col. HERRING:

—. Mr. Delehanty, how long have you lived in Cochise County?
A. About twenty years, sir.
Q. Whereabouts in the county do you live?
A. At Benson.
Q. What business are you engaged in there?
A. In the cattle business, livery business and saloon business.
Q. Been engaged in the livery business there a great many years hav-n't you?
A. Yes sir.

Q. And also in the cattle business?
435 A. Yes sir.

Q. What official position do you occupy in the County of Cochise?

A. Member of the Board of Supervisors.

Q. And as such, did you sit with the Board of Equalization during all of its meetings in July last?

A. Yes sir.

Q. Did you ever examine the Silver Spray, Holbrook, Copper Queen, Copper Jack, Baxter, Atlanta, Dividend or Rucker Mines?

A. No sir.

Q. Did you ever examine those mines with a view of determining their values?

A. No sir.

Q. Did you ever cause an examination to be made of either of these properties, for the purpose of determining their values?

A. No sir, no more than what I could learn from those that was in the Board, and some witnesses that have been there.

Q. Did you ever cause any person to examine either of these properties for the purpose of ascertaining their value?

A. No sir.

Q. Do you know anything of your own knowledge of the value of either of these properties?

436 A. I do not sir.

Q. Was any evidence taken by the Board of Equalization, at any meeting this year of the value of the hoisting works and improvements on the Holbrook Mine?

A. Yes sir.

Q. What evidence was taken?

A. I think Mr. Walter Douglas gave some evidence there in regard to it.

Q. Do you remember what evidence he gave?

A. Yes, he placed a value on the hoisting works and improvements there at about fifty thousand dollars, between forty-five and fifty thousand, the best I remember.

Q. Of the hoisting works and improvements on the Holbrook?

A. Spray you said didn't you?

Q. I am speaking now of the Holbrook. I asked you if any evidence was taken by the Board of Equalization at any meeting this year, of the value of the hoisting works and improvements on the Holbrook?

A. I don't remember of any.

Q. Was there any evidence taken by the Board of Equalization at any meeting this year, of the value of the hoisting works and improvements on the Silver Spray Mine?

A. Yes sir.

Q. What evidence?

437 A. Walter Douglas put a value of forty-five or fifty thousand dollars on them. I cannot remember exactly.

Q. On the Silver Spray hoist?

A. Hoist, yes sir.

Q. That is your recollection of his statement, is it?

A. That is my recollection.

Q. And did you base your valuation of the Silver Spray hoist on the Silver Spray Mine, on what Mr. Douglas stated to the Board?

A. We thought the machinery was worth more money than Mr. Douglas valued it at. We put a value of fifty thousand dollars on the hoist and machinery there connected with it.

Q. But you raised it; that property was already returned, was it not?

A. I don't understand you Colonel.

Q. The hoist on the Silver Spray was already returned to your Board, and included in the item $45,641.00. Now, in addition to what the Assessor returned, you raised the hoisting works and machinery, hoisting works and improvements on the Silver Spray Mine fifty thousand dollars. Do you say that you made that raise upon any testimony before the Board, in relation to that matter?

A. Yes, what we heard in regard to it from members present, and others that were there. Mr. Benton, I think made the state-
438 ment that it was worth more money; I don't know what he did say exactly—about seventy-five thousand dollors, or something like that, that it cost, or more.

Q. Who was Mr. Benton?

A. He was formerly Chairman of the Board of Supervisors of Cochise County.

Q. Do you know that he has ever been a miner?

A. I have heard he was, that is all I know.

Q. Was he sworn as a witness, Mr. Delehanty?

A. I think not, sir.

Q. Was he before the Board more than once?

A. I think he was up there, if I remember right, twice.

Q. Now, do you mean to say that each time that Benton was there, the subject of the valuation of the Copper Queen property was before the Board?

A. I think he was present there, yes sir.

Q. On both occasions?

A. I don't remember. He was there one time, and the other time I don't know what the Board had; some other mines I think.

Q. Was any evidence taken by the Board of Equalization of any other persons in relation to the hoist on the Silver Spray?

A. I don't remember any others, only what Mr. Reay *was* in regard to it.

439 Q. What did Mr. Raey say in regard to it?

A. He said that he thought it cost from seventy-five thousand dollars to eighty thousand dollars, along in there somewheres.

Q. Did he say he knew that?

A. He said he thought it cost that.

Q. Was this when you made the final raise, that he made that statement?

A. I think it was.

Q. Now, Mr. Delehanty, Mr. Raey was quite industrious about these raises on the Copper Queen properties wasn't he; quite zealous; quite industrious about it, wasn't he?

A. Yes, he knew more about it than any other member of the Board, because he had been over there and worked in them for years.

Q. He talked more about it than any other member of the Board?
A. He knew more about it than I did. Yes, he talked more about it.
Q. And you don't know that he knew more, but he said he knew more, is that it?
A. I am satisfied that he knew more than I did.
Q. You don't know of your own knowledge what Mr. Reay knew do you?
A. No sir, I do not.
Q. Only what he said he knew, that is all?
440 A. That is all.
Q. He frequently talked about these properties, did he not?
A. Yes sir.
Q. And he urged that they should be raised, did he not?
A. Well, that was a proposition before the Board, and he could not raise it alone.
Q. He urged that, didn't he?
A. Yes he did, because we supposed that he knew more about it than the other members.
Q. He urged that upon the consideration of the Board?
A. He did.
Q. That they should raise those properties up to where they were raised?
A. Yes sir, he did.
Q. Now, who first fixed these figures about these properties. Who first fixed the figures upon the Silver Spray Mine, for the raise of one million dollars, was it Mr. Reay?
A. No, I don't think it was.
Q. Was it Mr. English?
A. Mr. English was present there at the time.
Q. Who fixed the sum of one million dollars first?

Mr. ENGLISH: Why, the Board of Equalization.
Col. HERRING: That is unfair.
Mr. ENGLISH: I object, because——
441 Mr. MCFARLAND: It is not charged that Mr. English did it; and if Mr. English suggested it, it would be wholly irrelevant and immaterial in this matter.
The COURT: This may throw some light upon the good faith of the Board's action. The objection will be overruled.
Mr. MCFARLAND: I desire to make another suggestion. It is charged in the complaint that they heard no evidence. Now, if they had information coming from outsiders, yet that would not constitute fraud.
The COURT: That will be a matter for final argument.

A. I think Mr. English spoke about it, and Mr. York.
Q. Mr. English first, and then Mr. York?
A. Yes sir.
Q. Did Mr. English give any reason why that should be raised to one million dollars, that property?
A. He said he thought it was worth that.

Q. You took his statement and acted upon it?

A. And also Mr. York's.

Q. And Mr. York also said he thought it was worth a million dollars.

A. Yes sir.

Q. And you were guided by that, were you, in your action?

442 A. Yes sir.

Q. Now, who first suggested that the Holbrook should be raised to a million dollars?

A. It was suggested by the——

Q. At the same time by Mr. English?

A. I don't know whether it was Mr. English or Mr. York; I could not say for certain; they were both there, and Mr. Reay; they all made statements in regard to it.

Q. Did you suggest that they should be raised to a million dollars?

A. I didn't know anything about the Holbrook mine; I didn't know anything about any of the mines up there; I don't think I did.

Q. Did Mr. English say he knew anything about it?

A. Yes, Mr. English said he was acquainted there; been there a good many years; been over the ground, and had other information from people that worked there, etc.

Q. He was not sworn as a witness, Mr. English?

A. I think not.

Q. He was counsel there for the Board of Equalization?

A. Yes, he was present there.

Q. A counsel advising you?

A. Yes sir.

Q. What did Mr. York say about the Holbrook?

443 A. Mr. York said he thought the property was worth that.

Q. And so it was raised to that?

A. Yes sir.

Q. Did anybody else say anything about the Holbrook?

A. I think Mr. Reay said the property was worth that, and ought to be assessed at that amount.

Q. Now, the hoist and improvements on the Holbrook mine were raised ten thousand dollars. Who first suggested that should be raised ten thousand dollars?

A. I don't remember, some of the Board.

Q. You don't know anything about it?

A. I didn't know anything about it, only hearsay.

Q. The Copper Queen Mine was raised fifty thousand. Who made that suggestion first to raise that mine?

A. Some members of the Board or those present, English or Mr. Land.

Q. Were there any witnesses sworn as to the value of that mine?

A. Not that I know of.

Q. Were there any witnesses heard about the value of the Copper Queen Mine?

A. I think there was no witnesses there, except Mr. Douglas

444 and he refused to give any testimony in regard to the value of the mines.

Q. Why did he refuse?

A. He said it was the business of the office in New York, and that it was none of the Board's business; and it was none of his business to inform them in regard to it.

Q. Now Mr. Delehanty, did not Mr. Douglas tell you that the Copper Queen mine was worked out?

A. Worked out?

Q. The Copper Queen mine was worked out; did he not tell you that?

A. I don't remember; he may, but I don't remember it.

Q. Well, you are sure that Mr. Douglas said that the matters that you have just referred to, about the value of the hoist and improvements and the Copper Queen mine would have to be referred to New York?

A. He said he didn't know; he didn't know exactly that it was; he would have to refer it to the office in New York, to headquarters.

Q. He told you he didn't know?

A. He didn't tell us any way.

Q. Well, he said he didn't know?

A. I guess that is what he said.

Q. Who first suggested the raise on the Copper Jack mine of fifty thousand dollars?

445 A. I don't remember.

Q. Was there any evidence taken before the Board about the Copper Jack mine?

A. I think we discussed the location and such as that.

Q. Was there any evidence taken before the Board about it?

A. I don't remember any.

Q. The buildings and improvements were raised fifty thousand dollars. Who suggested that?

A. It was suggested by some member of the Board.

Q. Was there any evidence taken about the matter before the Board for the raise of fifty thousand dollars?

A. I think Mr. English made some statement in regard to it.

Q. Did he advise that raise of fifty thousand dollars?

A. I think he said something in regard to it, yes.

Q. Now, the Baxter was raised fifty thousand dollars. Who advised about that? Who first suggested that raise of the Baxter?

A. I don't remember.

Q. Was there any evidence taken about the raise on the Baxter?

446 A. Only whatever the Board discussed among themselves; what they knew. Mr. Reay knew something of it.

Q. What did Mr. Reay say about the Baxter mine?

A. I don't remember exactly what he said about it.

Q. Did he say he knew anything about the Baxter mine?

A. I don't remember that.

Q. Now, you raised the valuation of the Atlanta mine twenty-five thousand dollars by your report. Who suggested that raise of twenty-five thousand dollars?

A. Some member of the Board.

Q. You knew nothing about it, did you?

A. No sir.

Q. What member of the Board was it that suggested that raise of fifty thousand dollars on the Baxter?

A. I don't remember.

Q. Is that also true of the raise on the Atlanta, which you raised at twenty-five thousand dollars? Who suggested that? There is a big raise—twenty-five thousand dollars on the Atlanta?

A. It was some of the members.

Q. A quarter of a million. What member of the Board suggested that raise?

A. I don't remember now.

447 Q. Mr. Delehanty, do you mean to say that you consented to a raise of a quarter of a million dollars on mining property without evidence?

Mr. ENGLISH: Objection. He didn't say so.

Q. Was any witness sworn, Mr. Delehanty, who gave evidence upon which you based the raise of the Atlanta to twenty-five thousand dollars?

A. I don't remember any witness being sworn.

Q. Was that done upon the advise of Mr. English?

A. I don't remember that. No, it was some member of the Board; somebody suggested it, some member of the Board.

Q. Was there any reason given by that member of the Board?

A. Nothing that I remember of; they discussed the locations of those mines, and one thing and another, and concluded what the value ought to be, and the amount of ore shipped from the mines.

Q. Who pretended to know what amount of ore was shipped from the Atlanta mine?

A. The Board discussed it among themselves. They didn't know where the ore came from that was being taken out of it, or from different mines, run through from one mine to another, and hoisted up through that Spray shaft.

448 Q. They didn't know from which particular mine?

A. No.

Q. There was no evidence before you that any ore came out of the Atlanta mine?

A. Not any.

Q. Was there any evidence that ore came out of the Baxter mine?

A. Not any, but the group of mines they were working there.

Q. Then you based your valuation upon what evidence—what ore came out from the Copper Queen mines, is that it?

A. Yes sir.

Q. Now, the raise upon the Dividend mine was still a greater raise, three hundred and fifty thousand dollars. This is the admitted raise, in the answer of the defendants in this case. Each of these raises, you see, was more than a quarter of a million dollars. Why did you raise that mine that much?

A. It was done by the Board, and they thought the mine was worth that much. As I said, they discussed these locations. Those that knew them, Mr. Reay did.

Q. What locations?
A. The locations of the mines up there, the producing mines.
Q. What had that to do with the value?
449 A. Well, they didn't know where that ore came from; they thought it was close into that shaft, and it was worked through it. I don't remember now, but to the best of my memory, that is the way it was discussed; that it was close to some of those producing mines, or was a producing mine.
Q. What producing mine?
A. The Silver Spray and the Holbrook, and all of those supposed to be producing mines.
Q. But did you not raise the Dividend for some particular reason three hundred and fifty thousand dollars?
A. Yes sir.
Q. What was the evidence which induced you to raise that mine?
A. Well, it was discussed amongst the Board of Equalization.
Q. Was Mr. English present at that discussion?
A. I believe he was.
Q. Was it his advise to raise it to three hundred and fifty thousand dollars?
A. I don't remember that it was.
Q. Whose advise was it done on?
A. I think it was done on the Board's advise, probably, maybe Reay or York, I could not say which.
450 Q. Do you remember whether Reay discussed the Dividend mine before the Board?
A. I cannot remember now; he discussed most all of them; he gave his opinion of them.
Q. Now, you raised the Rucker mine, as shown by the admissions in this case, two hundred thousand dollars. Who suggested that that mine should be raised?
A. I cannot remember.
Q. Did you have any evidence before you as to the raise of the Rucker mine?
A. I don't remember of any, only discussions between the members themselves.
Q. Now, you discussed it between the members. You don't remember any evidence before the Board in relation to that raise? Here is a matter of a valuation of two hundred thousand dollars of property. Your discussion was simply a decision to raise it, wasn't it?
A. Yes sir.
Q. What did you want to raise all these properties for, Mr. Delehanty?
A. Why, it is in the group there of those mines that have produced all of this bullion and ore, that they have been shipping from Bisbee.
Q. Do you know what mine did it?
A. No.
Q. Did you have any evidence what mines did it?
451 A. No, but it was supposed to be in this group of mines—Silver Spray—all of those mines. We could not find out

which ones was the producing mines; we could not get any evidence to find it out.

Q. Did the Chairman of the Board ever state to you that the Board was invited to go over and visit those mines?

A. Yes; not the mines; not the mines, no.

Q. What did he tell you; to go to Bisbee?

A. Mr. York was up there at one time, and he said that Mr. Walter Douglas invited him up there, something in regard to a site to build a jail on; and he asked the other members if they could not come up there with him and decide upon it. I do not recollect of Mr. York saying to me that he was invited to go over and inspect the mines.

Q. Now, your Board did not have any evidence at all before it, from Mr. English or Mr. Reay, or anybody else, as to what mines the ore came from?

A. No, some of them thought it came from the——

Q. No, but did you have any evidence before the Board from what mines the ore came from?

A. No, not that I remember.

Q. And you did not have any such evidence to guide you in this assessment did you?

452 A. We all knew that it came from those mines in the vicinity of this Spray shaft there; in this group of mines.

Q. How did you know about it?

A. They got the ore in that vicinity.

Q. But you didn't know the mines it came from?

A. We tried to get evidence on the matter.

Q. You didn't know it, did you?

A. No, I didn't know it.

Q. And no one of the Board knew it, did they?

A. I don't know about that.

Q. Was there any evidence produced before the Board?

A. I think Mr. Reay said something in regard to some of those mines, that produced ore there.

Q. He did?

A. Yes.

Q. What mine was that?

A. I cannot tell you Mr. Herring; it is some of those mines close there to that shaft; I don't know the location; I forgot what he said.

Q. Do you know how much ore any of them produced?

A. I don't know.

Q. Did the Board know how much they produced?

A. I don't know; Mr. Reay probably knew, he worked there a long time.

453 Q. Did Mr. Reay ever state before the Board how much ore any of them ever produced?

A. If he did; I cannot remember.

Q. Did Mr. Reay ever state the value of any ore that was produced by any one of those mines?

A. I don't remember any.

Q. Did the Board have any evidence of the value of any ores produced by those mines?

A. I don't remember any.

Q. Don't you know as a matter of fact, that the production of these mines, is a matter of public record?

A. I never seen it.

Q. You never heard that?

A. I did hear.

Q. You never looked for it, did you?

A. No, I never looked for it, but I heard that the production of the mine amounted to about $14,000,000, I think it was, last year. I think it was a statement in some of those mining journals; I have never seen it, but it has been told to me.

Q. Now, who told you that?

A. I think Mr. York did, that he saw it.

Q. That the production of the mines of the Copper Queen Company was fourteen millions?

A. Yes, with a statement from the company, in some mining journal.

454 Q. Was that profit, net profit? Fourteen million dollars?

A. I don't know whether it was profit, but they produced that much.

Q. Was that stated to you at any meeting of the Board of Equalization?

A. Yes, I heard Mr. York speak about it.

Q. Was that before the raise?

A. I think it was.

Q. Did you, as a matter of fact, know any mine, from which the ore came, that produced that result?

A. No, I did not.

Q. Then, when you assessed these mines at that large sum of money, and made these raises, you were guessing at it, were you not; that it must have come from some of them?

A. It must have come from some of those mines in the vicinity.

Q. It was a pure guess wasn't it?

A. Yes, it could not be any more.

Cross-examination by Mr. ENGLISH:

Q. Did you rely upon the statements of Mr. Reay and others when you voted for these raises?

A. I did.

Q. Did you have any other idea than to place the true cash value upon the property of this complainant, in making these raises?

455 A. Not any.

Q. Is it not a fact that in the Copper Jack claim, or mine, that in the discussion of that claim, a map of that claim was brought from the Recorder's office and taken before the Board of Equalization, which showed that these large improvements, the Copper Queen store, buildings and the ware-house, the round house and the depot, were all situated upon the surface ground of the Copper Jack mine?

A. Yes, I remember that.

Q. Mr. Douglas was there at the time, and his attention was called to it, was he not?

A. I believe he was; I think you described it, yes sir.

Q. Mr. Douglas didn't think they were all on the mine, and we brought the map to show him that they were—the buildings I have mentioned?

A. Yes sir.

Q. Was Mr. Douglas, when before this Board of Equalization, asked as to where these ores came from, which particular mines? Was he asked that?

A. Yes sir, he was.

Q. What, if any, reply did he make to that question?

A. I don't remember exactly; but he didn't give any information in regard to which mines it came from; he would not tell.

456 Q. Didn't he refuse to state which ones it came from?

A. I think he did; he didn't give any information in regard to it.

Q. In adjusting these raises, these members as a Board of Equalization, did you not vote upon that subject, relying upon the statements made by Mr. Reay and others, before the Board of Equalization touching those values?

A. Yes sir.

Q. On each and every one of those mines to which there was a value added to the same as listed?

A. Yes sir.

Redirect examination by Col. HERRING:

Q. When you asked Mr. Douglas, or when Mr. Douglas was asked where the ore came from, did he tell you he didn't know which mine it came from?

A. I don't know what he said exactly. No, he said he didn't know. Yes, something like that; I believe that is what he said.

Q. Said he could not tell you; didn't know?

A. Something to that effect. At least, he didn't tell us any way.

457 Recross-examination by Mr. ENGLISH:

Q. At least, he didn't tell you?

A. No sir, he didn't tell us.

Redirect examination by Col. HERRING:

Q. State whether, during the sessions of your Board of Equalization, this year, there was any discussion before the Board, in relation to assessing unpatented mining cla-ms?

A. I don't remember anything.

Q. You may state why there was not, if you know?

A. I do not know any reason.

Q. Did you have the assessment roll before you?

A. Yes, we had it before us.

Q. The assessment roll of the County made by the Assessor for the Board, and was that examination before the Board?

A. Yes sir.

Q. In that examination, did you find any unpatented mining claims, as such, assessed?

A. I don't remember.

Q. If there were no unpatented mining claims as such assessed by the Assessor, upon that examination, why did you not require him to assess unpatented mining claims?

458 A. The Board thought he did assess all the property that was assessable.

Q. Then there was some discussion about it, was there?

A. There was some discussion in regard to some of the mines. We were not sure whether they were assessed or not; whether he had the full list of those mines or not.

Q. The unpatented mines?

A. Unpatented mines, yes.

Q. What was that discussion?

A. They were thinking that he did not get around to all of those mines and assess them; while we did not know which mines they were.

Q. That he didn't know, or the Board didn't know?

A. The Board didn't know, I guess.

Q. Well, do you mean to say that the Board did know some patented mines or some unpatented mines that he did not assess?

A. No, I don't think the Board knew of any that he did not assess.

Q. Was he called before the Board in relation to those matters?

A. He was present nearly all the time.

Q. Was he there at any time when the question of the assessment of unpatented mines was under discussion by the Board?

A. He was present nearly all the time there.

459 Q. Now Mr. Delehanty, you have lived here in this county for over twenty years, have you not?

A. Yes sir.

Q. And during that period you have been around the county a good deal, haven't you, more or less?

A. Yes sir.

Q. As a matter of fact, do you not know that there is a large number of unpatented mines in this county?

A. I think there is some.

Q. Don't you know there is a large number?

A. I think there is, yes.

Q. A very large number, for instance, here in the Tombstone District; a large district; you know there are a great many unpatented mines in that district, don't you?

A. I know there are lots of claims here.

Q. Mining claims?

A. Yes, I know there are a good many claims here.

Q. And you know there are a great many claims all over this county? This is a mining county, isn't it?

A. Yes sir.

Q. Notes as a mineral county?

A. Yes, I know there is a great many claims.
460 Q. You have heard of the Turquois Mining District?
A. Yes sir.
Q. And the Dragoon Mining District?
A. Yes sir.
Q. Pearce and Bisbee?
A. Yes sir.
Q. And the Great American Mining Districts?
A. I have heard of it, I don't know where it is.
Q. You have heard of the Chiricahua District?
A. Yes sir.
Q. And the Dos Cabezas?
A. Yes sir.
Q. And you know of the Huachuca Mining District?
A. Heard of it, yes sir.
Q. You know there are a great many mining claims throughout this county?
A. Yes, a great many.
Q. None of these were assessed by your Board, as mining claims?"

Mr. CLARK: We object to that, because that goes to the question of unpatented claims, and that is not in this case at all.
The COURT: The objection will be sustained.
Mr. ELLINWOOD: These other questions are the same thing, so I don't think I will read them.

461 "Recross-examination by Mr. MCFARLAND:

Q. You did cause the Assessor to add some mining properties that were omitted from the assessment roll, didn't you?
A. Yes sir.
Q. Belonging to this Company, the Copper Queen Company?
A. I don't remember, but the records——
Q. Did not the Board cause the Assessor to add to the assessment list fourteen claims belonging to the Lowell and Arizona Company?"

Mr. CLARK: We object to that; it has nothing to do with this.
The COURT: Objection sustained.
Mr. ELLINWOOD: I think it starts in here on page 106.

"Q. Did you hear any evidence at the return day of the notice, as to the value of those claims, or those you ordered the Assessor to place upon the assessment roll?
A. Yes sir.
Q. Was there anybody present at that time representing the Copper Queen Company?
A. The Copper Queen Company?
Q. Yes, was there any representative of the plaintiff there at that time?
462 A. I think Mr. Douglas said something in regard to them.
Q. Did you hear*d* any statement of his there under oath, or otherwise, in reference to the value of those claims?
A. He said something in regard to the Lowell mine, of those claims, but I don't remember exactly what it was."

Mr. ELLINWOOD: That is a claim we don't care anything about, and there is no use putting it in. That is all down to the re-direct.

"Redirect examination by Mr. HERRING:

Q. Do you remember Mr. Walter Douglas having some talk before the Board in relation to this Lowell group of mines?

A. Yes sir.

Q. Is it not true that Mr. Douglas stated to you that this Lowell group of mines was not owned by this company at the time the return was made?

A. When he came before the Board?

Q. Yes. Is it not true that he told you that this Lowell group of mines, which you finally caused to be added to the assessment roll, were not the property of the company at the time that this return was made by his company?"

463 Mr. CLARK: Is that re-direct?

Mr. ELLINWOOD: Yes sir.

Mr. CLARK: We object on the ground it is leading; this is re-direct.

The COURT: I will sustain the objection to that question.

"A. That they were a part of this group of mines of the Lowell mine?

Q. Did he not tell you that this Lowell group of mines were not the property of the Copper Queen Consolidated Mining Company at the time they had made the return to the Assessor of their property?"

Mr. CLARK: I object to that on the ground that it is leading and self-serving also.

Mr. ELLINWOOD: This is asking him what he said to him; he has before testified as to the facts.

The COURT: If the testimony offered developes that, it may go in on that theory of the case.

Mr. ELLINWOOD: I can read it.

Mr. CLARK: I will include a great many of those questions that I have allowed to go in.

"Q. Now Mr. Delehanty, in reply to a question by Mr. McFarland you stated that you took some evidence in regard to the value of this mine, the Lowell mine?

464 A. Yes sir.

Q. From whom did you take that evidence?

A. It was in the Assessor's room there. I think it was Mr. English. Somebody said those mines were transferred and had been sold, I think, during the last two years.

Q. Mr. English said that?

A. I think he said that there was a record that those mines had been sold for something in the neighborhood of a million and a half or two million dollars. Said there was a transfer.

Q. And when Mr. English said that, the matter was inquired into

further was it? When Mr. English drew your attention to that, the matter was further inquired into, by the Board, was it?

A. Yes, we discussed it.

Q. Did he tell you to what company they had been transferred?

A. I think the last transfer was to the Copper Queen Company.

Q. Afterwards, you learned that at the time of the assessment they had not been transferred to the Copper Queen Company?

A. I think Walter Douglas appeared before the Board and said he would answer for the Lowell group.

Q. And after this talk with Mr. English, you assessed this group at four hundred and sixty-nine thousand dollars? Did not the Board?

465 A. Something like that.

Q. And when you found they were not the property of the Copper Queen Company at the time of the return of the assessment roll, you reduced that assessment to fifty-four thousand dollars, didn't you? Is not that the way the assessment stands now?

A. I don't remember exactly what was done.

Q. I will state to you that it is admitted by the defendants in this case, that that was the assessment finally made upon this Lowell group of mines, fifty-four thousand dollars was the final assessment, was it not? You didn't make any assessment after that?

A. I don't remember. If that is the record.

Q. Did you have any evidence as to the Lowell mine, that consists of only two-thirds of an acre; did you have any evidence of that mine?

A. I suppose it is on record.

Q. Do you think the evidence is on record?

A. No.

Q. Did you take any evidence before the Board?

A. Not any.

Q. You suggested that mine at twelve thousand dollars. What reason did you have for assessing that mine at twelve thousand dollars?

A. The Lowell mine?

Q. Yes?

466 A. Well, it has been transferred for a good deal more money than that, from any party to another.

Q. Is that the only reason?

A. And information in regard to the amount of ore they have there.

Q. Out of the Lowell mine?

A. In the Lowell mines, yes sir.

Q. Who gave you that information?

A. I spoke to a good many.

Q. Name one person who told you they got ore out of the Lowell mine?

A. I seen some come out of the Lowell mine myself when I was up there.

Q. How did you know that it was the Lowell mine?

A. Only that they called it the Lowell mine.

Q. Do you know the size of the mine?
A. No sir.
Q. Did you go into the mine?
A. No.
Q. Was the shaft on the Lowell mine?
A. Supposed to *it;* I don't know that, but it is called the Lowell shaft.
Q. The Lowell shaft, from which you saw ore come out?
A. Yes sir.
467 Q. And that was the reason that you assessed the Lowell mine at twelve thousand dollars; is that one of the reasons?
A. That is the reason.

Recross-examination by Mr. ENGLISH:

Q. Do you know, Mr. Delehanty, in the deed from the Lowell & Arizona Mining Company to the Copper Queen Consolidated Mining Company, the consideration expressed in that deed, which is of record?

Col. HERRING: Objection. The consideration expressed in the deed does not show the value. Incompetent, immaterial and irrelevant to any issue in this case.
The COURT: Objection overruled.

A. I don't know the exact amount.
Q. Do you know, Mr. Delehanty, that there was five hundred dollars of Revenue stamps upon the face of that deed, as recorded in this county?

Col. HERRING: Objection. Immaterial, incompetent and irrelevant. Does not establish any issue in this case.
The COURT: Objection overruled.

A. Only hearsay; I have never saw it; I have heard it.

468 Redirect examination by Col. HERRING:

Q. You say that Mr. English drew your attention to this Lowell group of mines, and that he stated that it was sold from one party to another, for from one and a half to two million dollars?
A. Something like that.
Q. Mr. English stated that?
A. There were other parties there too. There were other parties, I think Mr. Reay was there too.
Q. One of the Supervisors?
A. Yes sir.
Q. What were the relations of Mr. English with the Board at that time?
A. He was attorney.
Q. Your attorney? Had you employed him as your attorney?
A. Yes sir.
Q. Had the Board of Equalization employed Mr. English as an attorney?

By the COURT: If the fact is admitted, the proof is unnecessary.

Q. What arrangement did you make with Mr. English as attorney for your Board?

469 Mr. McFARLAND: Objection. Immaterial and irrelevant, as to the arrangement. We have admitted that he was their attorney, and that covers the ground.

Mr. LAND: I selected Mr. English as counsel in this matter myself.

The COURT: Objection overruled.

Q. Now, you may state the arrangement that your Board made with Mr. English in this matter?

A. We have not made any arrangement particularly.

Q. What arrangement have you made?

A. Mr. Land advised us——

Mr. McFARLAND: Objection. The record is the best evidence of his employment and the scope of his employment.

Col. HERRING: I have examined the records, and there is no record at all of his employment. That is the reason I wanted to make this inquiry.

Q. What were the reasons of his employment?

A. The reason; he was employed to help the District Attorney in these cases.

Q. Employed by what?

A. He was employed to assist the District Attorney in those cases.

Q. In this?

A. In these tax cases.

470 Q. The Copper Queen?

A. Yes, and the Commonwealth.

Q. Those are the two large raises, that the Board raised?

A. They are the only two that were objected to in the county.

Q. Isn't it a fact that before you entered into the discussion of raising the assessments of the Copper Queen and the Commonwealth, that you have referred to, that Mr. English came before the Board in the capacity as an attorney, to aid and assist you?

A. I don't remember that he was employed before that as an attorney.

Q. Didn't he come before your Board in this matter before you raised these assessments?

A. I think Mr. Land suggested that he should be present there at the time of the equalization, at the time the Board of Equalization was in session.

Q. On these special matters wasn't it?

A. On these special matters, and others.

Q. Do you mean to say that Mr. Land expressed any wish that these raises should be made?

A. I don't remember.

Q. Is it not true that he did?

A. He may have said something in regard to them.

471 Q. Is it not true that on account of the county having been defeated in a previous tax suit that Mr. Land came before you and urged that this property be raised this year?

A. It is not, sir.

Q. Objection.

Q. Is not that true?
A. No sir.
Q. Was not something said of that kind before the Board?
A. I don't remember hearing anything.
Q. You don't remember hearing that discussed before the Board in any shape.
A. Only what we were equalizing at the time.
Q. And didn't the Board talk among themselves, the fact that the taxes had been defeated before, and that they were going to this time, raise the taxes?
A. I don't remember. They talked about the taxes of the year before, but they didn't say anything in regard to anything else.
Q. They did talk about the fact that the taxes had been defeated?
A. Yes, of course they did.
Q. That question was before the Board?
A. They spoke about it, and asked how it was before, etc.
Q. And that was in the minds of the Board when they made these raises?

472 A. I don't think so. I am speaking for myself.

Q. What was this arrangement with Mr. English, contingent fee, that he was to get for the services to be rendered to this Board?
A. He was to get a fee, yes sir.
Q. To get a contingent fee if he made these raises stick?
A. The Board did not make any arrangement with Mr. English, not yet.
Q. For his compensation?
A. No sir.
Q. Not at all?
A. No sir.
Q. Has not been talked to by the Board?
A. He had been engaged, but there was no specific amount, or anything like that, agreed upon.
Q. But he was to get some particular and special compensation if he made these taxes stick?
A. No sir.
Q. Or if this raise stuck, remained?
A. No sir.
Q. Nothing of that kind?
A. No sir.
Q. Why did you want his services?
A. The Board thought it was necessary to have him to assist Mr. Land.

473 Q. To assist Mr. Land?

A. Yes sir.

Q. Did Mr. Land render any services to this Board during this time?

A. Yes, he was present.

Q. With Mr. English?
A. Yes sir.
Q. Was he also urging the raise in the Copper Queen?
A. Nothing more than the members spoke about it, and he stated something in regard to what he knew. It was all left to the Board, after they discussed it, and the merits of the property, what they thought about it.
Q. Why were you specially after the Copper Queen?
A. I think it is the most valuable property in the county.
Q. That was the reason?
A. Yes sir.
Q. It was not that you wanted to get the rate reduced?
A. No sir.
Q. You remember that that was not the object?
A. No sir.
Q. You didn't intend to reduce the rate?
474 A. To a certain extent. It could be done by assessing those properties what they ought to be assessed at.
Q. Then the question of lowering the rate was discussed by the Board before you made the raises?
A. Yes, that is right.
Q. Now then, will you tell me why you did not raise these properties here on the hill, the Tranquility?
A. The Tranquility?
Q. Did you know that was a producing mine?
A. We knew there were some chloriders working there; we didn't know what they produced.
Q. Did you make any inquiries about it?
A. I did not myself.
Q. Did you make any inquiries about the Peabody mine?
A. Yes sir.
Q. Whom did you make inquiries of?
A. Some parties that worked there.
Q. Did you raise that mine?
A. Yes sir.
Q. Was that raise allowed to remain?
A. Yes sir.
Q. On the Peabody mine?
A. I think it was, there is a record; I don't remember exactly, but it was allowed to stand.
475 Q. You say you raised only the Commonwealth and the Copper Queen?
A. There was another mine, the Mam-oth mine, over there in the district, the Peabody mine and the Mam-oth mine. Both of them have been raised.
Q. What was the time of year that you were down at Bisbee, when you say you were at the Lowell group?
A. It was in November, a year ago last month
Q. It was not in this year at all?
A. No sir.

Recross-examination by Mr. FARLAND:

Q. You say there were other mines raised besides the Copper Queen?
A. Yes, two mines out here in Johnson District?
Q. Do you remember what they were assessed at?
A. I don't remember.
Q. Do you remember the amount of the raise?
A. I do not, it is on record.
Q. Wasn't one of them two hundred thousand dollars.
A. I could not say exactly, there is a record, I don't remember the figures.

476 Q. Did you raise all the mines or mining properties, the assessed value of which you found to be too small?

A. Yes sir.
Q. All that you knew of?
A. Yes sir.
Q. All that you had any information about?
A. Yes sir.
Q. Do you mean that the tax rate that you speak of, was discussed before the Board of Supervisors or the Board of Equalization?
A. I don't know which, the Board of Equalization or the Boaard of Supervisors; I remember it was discussed.
Q. Which body places, fixes the rate, the Board of Supervisors or the Board of Equalization?
A. The Board of Equalization.
Q. Then you say, was that matter discussed before the Board of Equalization or Board of Supervisors?
A. I think it was the Board of Supervisors, I don't know which. We discussed it there between ourselves; we said if the property of the county was assessed at a fair value, that the assessment could be reduced some.
Q. The rate?
A. The rate.

477 Q. Was that your object in equalizing—to assess the property at which you considered to be a fair cash value, from such evidence as you had before you?

A. Yes sir.

Redirect examination by Col. HERRING:

Q. Didn't you know what the Territorial rate of tax was to be; what it was certified to you by the Territorial Auditor, as the rate per hundred, for the Territorial tax; that it was $1.17 on the hundred? You knew that din't you?
A. Yes sir.
Q. I want to ask you this question——"

Mr. JUDSON: The Court has ruled out the opinion of the witness there.

Mr. ELLINWOOD (reading): "Objection sustained.

Mr. JUDSON: That is all.

Mr. ELLINWOOD: That is all.

(Attached to said evidence is the following certificate:

"In the District Court of the First Judicial District of the Territory of Arizona in and for Cochise County.

478 COPPER QUEEN CONSOLIDATED MINING COMPANY, Plaintiff,
vs.
COUNTY OF COCHISE and M. D. SCRIBNER, Treasurer and ex-Officio Tax Collector, Defendants.

Reporter's Certificate.

I, Francis M. Hartman, Court Reporter of the First Judicial District of the Territory of Arizona, in and for Cochise County, do hereby certify that I was present at the trial of the above styled cause, on December 9th, 10th and 11th, 1901, in said court; that I took down in shorthand all the testimony adduced at said trial: that I have transcribed the same; and that the foregoing three hundred and sixteen (316) typewritten pages constitute a full, true and correct transcript of said shorthand notes, and all of the oral testimony adduced at said trial.

Witness my hand this 21st day of December, 1901.

FRANCIS M. HARTMAN,
Official Court Reporter, First Judicial District of the Territory of Arizona in and for Cochise County."

479 Mr. CLARK: Before we go on with any other witness, we move to strike out all of this evidence, and especially in so far as it relates to the valuation or over-valuation of the claims embraced in this proceeding, or any of them, for the reason that the question of valuation cannot be tried before this Court in this proceeding, and for the further reason that the testimony in so far as it relates to anything except to the fact that evidence was taken, or judgment was exercised is inadmissible, and ought not to be admitted, and perhaps the strongest argument to this motion to strike out, I desire to quote the objection of Mr. Ellinwood, counsel for the defendant, to the introduction of a *phono*graphic report of Mr. Walter Douglas' testimony in the other trial of this action.

Mr. ELLINWOOD: I confess myself in error in that.

Mr. CLARK: I desire, in as much as it is sprung as a concise statement of the law, to read it.

Mr. ELLINWOOD says: "It is not a deposition; it purports to be evidence taken some four or five years ago in another suit between different parties, and in another suit, which did not involve the issues in this case.

The COURT: The motion will not be granted at this time, but will be considered when I make my final ruling.

Mr. ELLINWOOD: Mr. Hopkins, take the stand.

480 A. A. HOPKINS, being called as a witness on behalf of the defendant, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. ELLINWOOD:

Q. Your name is A. A Hopkins?
A. Yes sir.
Q. You are the Under Sheriff of this county?
A. Yes sir.
Q. As such, did you have placed in your hands a subpœna for George B. Reay?
A. I did.
Q. What did you—did you endeavor to serve it?
A. I did.
Q. What did you do in your endeavor to get service?
A. I made inquiries of most everybody I knew that might know where he was, and also telephoned to his brother in Douglas.
Q. What did you discover from him?

Mr. CLARK: I object to that.
Mr. ELLINWOOD: It is the Sheriff's duty to show.

Q. What did you find out?
T. That he was said to be living in Paris, California.
481 Q. Who told you that?
A. His brother, I think it was; it was a member of the firm of Reay & Johnson.
Q. Mr. Hopkins, you are well acquainted in this County are you?
A. Yes sir.
Q. Do you know Mr. Reay?
A. Yes sir.
Q. Do you know whether he is in the county?
A. I don't know whether he is; I haven't been able to find him.
Q. What search have you made for him?
A. By inquiry and looking for him.
Q. And you got your information from his brother?
A. Yes sir.
Q. And did you make——
A. Over the telephone.
Q. And did you make inquiries of any other persons?
A. Yes, several personal.
The COURT: Have you returned the subpœna?
A. I believe it is; I will go down and see.

Mr. ELLINWOOD: I wish you would.
The WITNESS: I think I returned it that I could not find him; that he was said to be in California.
The COURT: Ascertain.

Witness excused.

482 Mr. JUDSON: On that showing, we make the offer of the testimony of the witness.
Mr. CLARK: We object, for the reason that the evidence, as

elicited by the defendants, shows that the witness is alive, and that his place of residence is known, and this return, and the testimony of the officer would convince any one that it could have been known by the exercise of any diligence long ago, there is no showing, therefore, of diligence in procuring the deposition of the witness himself, and that consequently comes within the provisions of the statute under which this testimony might, under certain circumstances, be admissible. It is shown here that this subpœna was not delivered to the officer until the 19th day of November. That is the return. The testimony of the other Supervisors taken does not show that he was an adverse witness but shows that he was a willing witness.

The COURT: The statute provides for the reading of a *phonographic report for* the former testimony, and does not require that they should have taken his deposition. The only requirement of the statute is that the party should be beyond the jurisdiction of the Court; that being the case, they will be permitted to introduce the evidence.

The evidence of the witness George B. Reay was now read into the record of this case from the Official Reporter's transcript of the evidence in cause No. 2239, and the same is in the words and figures following, to-wit:

483 "GEORGE B. REAY, being first duly sworn, testified on behalf of the plaintiff, as follows:

Direct examination by Col. HERRING:

Q. Where do you reside?
A. At Bisbee.
Q. How long have you resided in Bisbee?
A. About six years.
Q. How long have you resided in the County of Cochise altogether?
A. In Cochise County all the time.
Q. What is your occupation, Mr. Reay?
A. Merchant.
Q. How long have you been a merchant?
A. I have been in business now for about two years.
Q. Where are you engaged in business as a merchant?
A. In Bisbee, Arizona.
Q. Before becoming a merchant, were you in any other business?
A. Yes sir.
Q. What was your business?
A. Miner.
Q. Where did you mine?
A. In Bisbee.
Q. How long did you mine in Bisbee?
484 A. For four years, nearly four years.
Q. For what company did you mine?
A. The Copper Queen Consolidated Mining Company.
Q. Four years ago, what mines did you work in, do you know?
A. I worked in several of them, yes sir.
Q. You know, do you?

A. Yes sir, I know the mines.
Q. What did you work in four years ago?
A. It is hard to say, because I worked in several. I worked in the Holbrook, the Atlanta, the Spray, the Silver Bear.
Q. Any other one?
A. In the Baxter.
Q. Any other one?
A. As to the others, I could not say.
Q. Did you say the Silver Bell or Silver Bear?
A. The Silver Bear.
Q. Have you, within the last year, examined the Silver Spray, Holbrook, Copper Queen, Copper Jack, Baxter, Atlanta, Dividend or Rucker mines of plaintiff, with a view of determining their value?
A. No sir.
Q. Have you, during that period, caused an examination to be made of either of these properties, for the purpose of determining their value?

485 A. No sir, I have not.
Q. Do you know anything of your own knowledge, during the past year, of the value of either of these properties?
A. Why, I have not been into the properties.
Q. I ask you during the last year, do you know anything of your own knowledge of the value of either of these properties?
A. All I can say is what I have heard about the properties, and the mines over there among the people.
Q. I am asking you of your own knowledge?
A. No sir, not of my own knowledge.
Q. You don't know of your own knowledge, is that true?
A. Yes sir.
Q. Sitting as a Board of Equalization, Mr. Reay—you are a member of the Board of Supervisors are you not?
A. Yes sir.
Q. Now, sitting as a Board of Equalization this year, 1901, your Board has admitted by the answer of the defendants, says that they raised the valuation of the Silver Spray mine one million dollars. Did you agree to that raise?
A. Yes sir.
Q. As a member of that Board?
A. Yes sir, I did.

486 Q. Was any witness sworn before your Board in relation to the value of that property?
A. No sir.
Q. Was any evidence taken before your Board, as to the value of that property?
A. The only evidence was among ourselves.
Q. Now, who among yourselves, gave evidence of the value of that property?
A. I was asked by the other members of the Board if I thought the property was that valuable, and I told them I thought it was.
Q. What member of the Board asked you that?
A. I could not say which one of them it was.

Q. And was that all the evidence taken?
A. Yes sir.

Q. You say you worked as a miner at one time for this company; and do you know where the Silver Spray mine is, underground?

A. Well, all I know is what I heard; what they call the Silver Spray mine, when I was working there. I could not swear to the lines.

Q. Didn't you acknowledge when Mr. Douglas was called to appear, that you did not distinguish between the Silver Spray mine, and what was called the Silver Spray; that you did not distinguish between the Silver Spray mine, and what was regarded as Silver Spray country, or Silver Spray ground?"

487 Mr. CLARK: I object to that on the ground it is leading, and it is intended as an impeachment of his own witness on direct examination.

Mr. JUDSON: I don't think the question was answered, so it don't make any difference.

"Q. Did you not admit or acknowledge to Mr. Douglas, when he was before the Board of Equalization, that you didn't distinguish between the Spray—Silver Spray mine, and what was called the Silver Spray ground?"

Mr. CLARK: The same objection; it is intended as an impeachment of his own witness.

The COURT: I don't think it is an impeachment of the witness, and as such I think it is admissible. It is testing his knowledge. The answer may stand.

"A. Yes, I didn't distinguish anything between the two of them.

Q. What do we understand you to mean by the Silver Spray ground?

A. The Silver Spray mine.

Q. Then, you consider them both the same?

A. Yes, the Silver Spray mine and the Silver Spray ground was considered the same.

Q. Did you give the Board any reason why the Silver Spray mine should be raised one million dollars?

488 A. No, I don't know as I gave them any reason for it; it was agreed among all the Board; it was understood among all the Board, and they asked me if I thought the property was that valuable, and I told them I thought it was.

Q. They asked you, you didn't volunteer that statement; they asked you?

A. Yes, I was asked by members of the Board.

Q. What reason did you have for saying it was worth a million dollars?

A. I seen a good large bodies of ore in the Silver Spray?

Q. Four years ago?

A. In the last two years.

Q. It was not this last year?

A. No sir, this last year I have not been in the mine.

Q. You don't know anything about the condition of the mine this last year?

A. No.

Q. What reason did you have?

A. Simply because the miners working there claimed that they were taking the same amount of ore out of the ground as when I was there.

Q. How do you know that?

A. I got it from men working in the mine.

Q. What men?

A. All the men working there.

489 Q. And merely because they were taking ore out of the mine as they were when you were there, you thought the mine was worth a million dollars?

A. Yes sir.

Q. Did you ever know a mine to be worked out?

A. I have known mines to be worked out, yes sir.

Q. Do you think a mine is more valuable on account of ore having been taken out of it; that it is more valuable afterwards, for that reason?

A. No sir, I do not.

Q. You worked there, you say, four years ago?

A. Two years ago.

Q. Now, if they have been taking ore of that mine two years; do you think that the fact that they have been taking ore out of that mine two years, makes the mine more valuable?

A. I don't think they have worked it out.

Q. Do you think so?

A. I don't think it makes it more valuable.

Q. It would be unreasonable to think so; that it would be more valuable?

A. It would certainly.

Q. I think I asked you, whether you knew when you were under ground, whether you were in the Silver Spray mine or not?

490 A. Did I know whether I was in the Silver Spray mine or not?

Q. Yes?

A. All I know, they called it the Silver Spray.

Q. You did not know of your own knowledge?

A. I did not know of my own knowledge where the lines of the Silver Spray were underground, no sir.

Q. Mr. Reay, as a miner, and from what you know about mining, from your acquaintance with the mines at Bisbee, don't you know that all of the ore that comes out of the Silver Spray shaft, does not come out of the Silver Spray?

A. No sir, I do not."

Mr. CLARK: We object to that, because it is cross-examining his own witness.

The COURT: The answer may stand.

"A. No sir, I do not know.

Q. You never learned the fact?

A. No sir.

Q. You don't know as a fact that the Silver Spray shaft is sunk to connect with other mines? Is that true?

A. It is sunk to connect with other mines, yes.

Q. And did you ever see any ore come out of the other mines?

A. Not out of the Silver Spray shaft, no sir.

491 Q. Up to two years ago?

A. The Silver Spray shaft was not finished two years ago; they were not taking any ore out of it two years ago. They worked it from the Holbrook shaft.

Q. How did you know you were in the Silver Spray ground working?

A. How does any man know, only as he is told that this is where he is working at.

Q. I ask you the question. How did you know?

A. I was told that is where I was working, in the Silver Spray.

Q. What time was it in the year, two years ago, when you quit there?

A. I quit there two years ago in September, I believe it was; two years ago last September.

Q. Who was it told you about the ore coming out of the Silver Spray this year, the names of the parties?

A. I could not name all of the parties.

Q. Name any of them?

A. Why, it is common talk of the town; that is all I could go by; I would not name any one party at all, because it is the common talk of the town; the ore that is coming out.

Q. Out of what?

A. Out of the mine.

Q. Or out of the shaft.

492 A. Out of both the mine and the shaft.

Q. Can you name any one person who has talked this common talk; if the thing is so common?

A. No sir.

Q. Did you base your conclusion as to the value of this Silver Spray mine from the fact, or from what you heard of all the ore that came out of the Silver Spray shaft?

A. No sir, I did not.

Q. What else did you base it upon?

A. I based it upon the ore that was taken out, claimed to be taken out of the Silver Spray

Q. Silver Spray what?

A. Silver Spray mine.

Q. Claimed by whom?

A. By miners working in the mine.

Q. Name any of them?

A. I could not say any one miner at all.

Q. And when did you hear anything of this kind about this Silver Spray mine?

A. Several months ago.
Q. Do you mean to say that you heard it this year?
A. Yes sir.
Q. Now, the raise upon this mine, from five dollars per acre to a million dollars, is a very serious increase wasn't it?
493 A. I don't know as there is anything serious about it.
Q. It was a large increase?
A. Yes sir.
Q. And you know that it would necessarily impose a large burden upon this mine, did you not?
A. Yes sir.
Q. Now, did it occur to you in the performance of your official duties, that you should ascertain the facts and the truth about this mine, or that you should base your judgment upon mere hearsay?
A. Well, if we had to go on anything else, it would be pretty hard to get it except hearsay.
Q. Did you attempt to make any examination of this property?
A. No sir, I did not.
Q. Were you ever refused permission to examine it?
A. No sir.
Q. Why was it that you raised this sum to a round sum of one million dollars? Did you fix this one million dollars, this abstract number as the raise of the valuation of this mine?
A. Simply because we t-ought the mine was that valuable.
Q. It was simply a guess on your part, wasn't it?
494 A. No. I don't know as it was a guess at all. That is all we can go by, is what we think it is worth.
Q. It was not based upon your knowledge, was it?
A. My personal knowledge, no sir, because I did not examine the mine.
Q. Was it based upon the knowledge of anybody else?
A. No sir.
Q. What other person?
A. I said no sir, it wasn't.
Q. Then you assumed it to be worth a million dollars, didn't you?
A. Yes sir.
Q. Wasn't that a guess?
A. There was no guess about it.
Q. It was an assumption by the Board that it was worth a million dollars? And it is altogether as what you have said now, upon the evidence submitted, is that true?
A. Yes sir.
Q. Can you tell me why this arbitrary figure of one million dollars——

Mr. McFARLAND: Objection to the fact that it was arbitrary. No such assumption.
The COURT: Objection sustained.

Q. Can you tell me why the sum of one million dollars was assumed to be the value?

495 A. Because we thought it was worth about a million dollars.

Q. Wasn't it because you determined to put a million dollars assessment upon it?

A. No sir.

Q. You did determine to put a million dollars assessment upon it?

A. We did do it after we concluded it was worth that much, yes sir.

Q. And that was all upon your statements to the Board?

A. I presume it was, yes sir.

Q. Did you have any accurate knowledge of how many tons of ore extracted daily from the Silver Spray?

A. No sir.

Q. Did you have any accurate knowledge of the value of the ore that came out of the Silver Spray?

A. No sir, not the least at all.

Q. Upon what did you base your assumption that it was worth a million dollars?

A. We could hear that the mine was very valuable, and that they had taken out lots of ore.

Q. Then, that was as I have stated, just a guess on the part of the Board, that that would be the value of the mine?

A. We could not get any information otherwise.

496 Q. You have not answered my question. It was a mere guess on the part of the Board, that that would be the value?

A. We assumed that the property was that valuable.

Q. It appears by the admissions of the defendants in this case, that your Board of Equalization raised the Holbrook mine a million dollars, from the amount returned. On what evidence was that raise made, Mr. Reay?

A. The raise on the Holbrook?

Q. Yes?

A. The same evidence in regard to the Spray.

Q. And no other?

A. No sir.

Q. Have you been in the Holbrook this year?

A. No sir.

Q. Have you caused anybody to go into the Holbrook this year to examine it?

A. No sir.

Q. To return its value?

A. No sir.

Q. Did you know the amount of ore that daily came out of the Holbrook?

A. No sir.

Q. Then, this was a pure assumption on your part, of the value, was it not?

A. Yes sir.

497 Q. How long a time did you work in the Holbrook mine, Mr. Reay?

A. I could not say how long. I worked off and on for quite awhile; I did not work in the Holbrook constantly.

Q. There was a good deal of ore taken out when you worked there?

A. Yes, sir, there was.

Q. A good deal?

A. Yes, sir.

Q. Did that make the mine any more valuable, after it was taken out?

A. I don't know as it did; there was lots of it left there yet.

Q. Do you think it did?

A. No, sir.

Q. How do you know there was lots of it left there?

A. There was *k*ots of it left when I left there.

Q. How do you know that?

A. Because I could see it.

Q. See it, how?

A. By looking at it, of course.

Q. Two years ago.

A. Yes, sir.

Q. That was where the mine had then been opened for stoping or work?

498 A. It was already opened up for stoping and work.

Q. And they were then taking out the ore?

A. Yes, sir.

Q. You don't know *where* there is any of that ore left there or not?

A. I could not swear to it, no.

Q. Now then, it is admitted in the answer of the defendants in this case, that your Board raised the Copper Queen mine fifty thousand dollars. Upon what basis did you assume to make that raise?

A. On the Copper Queen mine?

Q. Yes, fifty thousand dollars?

A. Simply because we thought it was worth fifty thousand dollars.

Q. Upon what did you base your thought that it was worth that?

A. Simply because it was adjoining with the other properties, and had been worked there with those properties.

Q. Do you know how long it is since the Copper Queen had been worked?

A. No, sir.

Q. Did you ever work in it?

A. No, sir.

Q. Do you know anybody who worked in there during the last two years?

A. No, sir, I do not.

499 Q. Then why did you raise the value of that property fifty thousand dollars? Why did your Board raise it?

A. Simply because they thought it was worth that much.

Q. Did you tell them so?

A. No, sir, I did not.

Q. Who did?

A. I could not say.

Q. Any evidence taken as to the value of that property?

A. No, sir, there was not.

Q. Not a particle?

A. No, sir.

Q. Now, it is admitted by the answer of the defendants in this case, that the Baxter mine was assessed by your Board at two hundred and fifty thousand dollars. Upon what did the Board base that raise?

A. Because we thought it was that valuable.

Q. Why did you think so?

A. Because we thought it was that valuable.

Q. Why did you do it; why did you think so?

A. And the information that we heard from there, that they were taking out ore. I heard from there that they were taking ore out of the Baxter.

Q. Last year?

500 A. Yes, sir.

Q. Did you hear they were taking any ore out of the Baxter this year?

A. I have not heard any one say anything about taking ore out of the Baxter this year.

Q. Do you know whether any ore has been taken out of the Baxter this year?

A. No, sir.

Q. Did you have any evidence that any had been taken out?

A. No, sir.

Q. Do you know whether the Baxter is a worked out mine or not?

A. I could not say.

Q. Who told you about ore being taken out of the Baxter this year, anybody?

A. No, sir.

Q. Why then, did you assess the Baxter at—why did you raise the Baxter two hundred and fifty thousand dollars, your Board?

A. Because we thought there was still ore in the Baxter, and that it was valuable property.

Q. But you had no information?

A. No.

Q. Then you based that raise upon a pure assumption of value?

A. Yes, sir.

501 Q. Did you make any effort to get any information in relation to the value of the Copper Queen mine or the Baxter mine?

A. No, sir.

Q. Now, the answer in this case shows that your Board raised the Dividend mine three hundred and fifty thousand dollars. Upon what did you base that raise?

A. That they were taking ore out of the Dividend mine.

Q. When?

A. This year.

Q. How did you learn that fact?

A. By common talk of them men that were working in the mine.

Q. Did you learn how much they were taking out?
A. No, I did not learn how much.
Q. Did you learn anything about the value of the ore they were taking out of the Dividend?
A. No, sir.
Q. From whom, from what persons, this common talk, did you learn that any ore was being taken out of the Dividend mine this year?
A. I could not say who they were.
Q. Was there any other evidence brought before the Board than your statement about this mine?
A. No, sir, there was not.
502 Q. I asked you whether any evidence was brought before the Board in relation to the Baxter and Copper Queen, and you said no?
A. I told you no.
Q. It appears by the admission of the defendants in this case, that your Board raised the Rucker mine two hundred thousand dollars. Upon what did you base that assumption?"

(At this point in the reading of said evidence into the record, it was agreed between the parties that the remaining evidence of the witness George B. Reay might be copies into the record by the Reporter.)

Mr. ELLINWOOD: It runs from page 122 in the other record to page 310.

Mr. CLARK: It is agreed by the plaintiff that the testimony of George B. Reay as given in case No. 2239, and phonographically reported according to the transcript of the record on file in this Court, may be incorporated into the record in this case in full, subject to the objection of plaintiff to the phonographically reported testimony of Mr. Delehanty already given, and subject to the further objection that most of it is leading, and is an attempt on direct examination of counsel for the plaintiff in that action to impeach his own witness, and subject to the motion to strike out that has been made to the testimony of Mr. Delehanty, and also that
503 all of this testimony goes to the proposition of an overvaluation of the properties involved in this tax suit, a point, as we contend, or a question, as we contend, which may not be tried by this Court, for the reason that there is a special statutory proceeding in which that could have been and should have been tried by this defendant, and they neglected to avail themselves of that privilege. I don't think of any other objections or motions that I have.

"A. Just the same as the Dividend; on the same assumption as the Dividend.
Q. That ore was being taken out?
A. Yes, sir.
Q. Whom did you learn that from?
A. The same source as I said as to the Dividend.
Q. Did you learn what quantity of ore was being taken out of the Rucker?

A. No, sir.
Q. Did you ever work in the Rucker?
A. I did, yes, sir.
Q. How many years ago?
A. I worked in the Rucker about three years ago.
Q. And when you stopped was there any ore in the Rucker of any kind?
A. Yes, sir.
504 Q. Of any particular consequence?
A. There was considerable ore there; they strike the ore in bodies; it was no regular thing.
Q. Don't you know that soon after you quit working in the Rucker, that work was discontinued on the Rucker?
A. No, sir, I do not know that.
Q. You don't know that?
A. No, sir.
Q. And it was only upon your evidence then, that this Board assumed to raise the Rucker two hundred thousand dollars?
A. Yes, sir.
Q. Now, the Copper Jack mine is admitted by the defendants to have been raised fifty thousand dollars. Were you ever in the Copper Jack?
A. No, sir.
Q. Upon what basis was this raise made of fifty thousand dollars on the Copper Jack?
A. Simply because all of the buildings of the Copper Queen Company, most all of them, are on the Copper Jack property.
Q. Would it make the mine any more valuable?
A. We considered it valuable, yes, sir.
Q. Now, is it not true that the return which was made to your Board, returned the buildings and improvements separately, separately assessed?
505 A. Yes, that is true.
Q. Then you had already assessed these buildings and improvements, and you raised the value of the mine fifty thousand dollars?
A. Yes, sir.
Q. You raised the value of the improvements too?
A. Yes, sir.
Q. Now, upon what basis did you do that?
A. Do what?
Q. Make these raises?
A. On what particular property?
Q. On the buildings and improvements, and on this mine?
A. Because we thought the buildings were worth more than they were assessed for.
Q. Did you take any evidence upon the subject?
A. No, sir.
Q. And that is why you raised the value of the mine?
A. Yes, sir.
Q. Because the buildings were on it, and worth more than represented?

A. Yes, sir.
Q. The buildings had a value of their own?
A. They did, certainly.
Q. They didn't give any value to the mine?
506 A. The ground had a value too.
Q. Did they give any value to the mine, as a mine?
A. No, I don't know as they did.
Q. You don't know whether any ore had been taken out of the Copper Jack for years, do you?
A. No, sir, I do not.
Q. It has been stated here, Mr. Reay, that you stated before the Board of Equalization, that the hoisting works and improvements on the Silver Spray mine were worth one hundred thousand dollars. Did you make that statement before the Board?
A. I did, yes, sir.
Q. Why?
A. Because I had heard that is what it cost to put the engine and buildings up there.
Q. From whom?
A. The people that were working there; I could not say who they were; when they were building it.
Q. When did you hear that?
A. Some time last year.
Q. Was this a mechanic that you heard talking?
A. I could not say whether they were mechanics or what they were.
Q. Was he a person engaged in doing the work?
507 A. I think they were working there.
Q. A laborer engaged in doing the work?
A. Yes, sir.
Q. And you heard from that person?
A. Not from one person; from men working there; I could not say who they were.
Q. Do you think that an official charged with the duty of raising valuation, that — the say so of a workman as to what a large building and machinery of that kind cost?
A. I do, yes, sir.
Q. That that should be relied upon?
A. Yes, sir.
Q. That is your idea of the facts upon which to base a raise of the valuation of property?
A. Yes, sir.
Q. As one of the assessing and taxing authorities of this county, that is your idea of it?
A. Yes, sir, it is.
Q. Was there any other evidence before the Board as to the value of the Silver Spray hoist?
A. No, sir, except what Mr. Douglas gave himself.
Q. Now, it has been stated that Mr. English gave evidence before the Board in relation to the value and improvements of the Silver Spray mine?

508 A. Mr. English's statement was just simply hearsay, the same as mine.

Q. Did he make any statement?

A. He didn't make any statement before the Board that it cost that amount, no, sir.

Q. He did not?

A. No, sir.

Q. Did not Mr. Douglas make a statement to you or to your Board, in relation to the value of that Silver Spray hoist?

A. He did, yes, sir.

Q. Didn't he tell you what it had cost?

A. He did.

Q. Did you consider the statement of a person who was the Superintendent of the mining company, and directly in connection with knowledge of the facts; did you consider that of more credit than what workmen would say, or less credit?

A. I don't know as we did.

Q. But after hearing Mr. Douglas state to you what the cost of that was; that the cost of the Silver Spray hoist was fifty-one thousand dollars, and knowing that return had been made for it under the law, why did you raise it fifty thousand?

A. Mr. Douglas did not state whether the buildings and hoist cost that much; he stated the hoist, as near as I understood it.

509 Q. Didn't Mr. Douglas offer to bring you the invoices of the cost of that hoisting works and improvements?

A. Not that I know of, no sir.

Q. And notwithstanding any statement Mr. Douglas made, you raised that fifty thousand dollars; the Silver Spray improvements and hoist—hoisting works and improvements?

A. Yes sir.

Q. Now, Mr. Reay, if you were a creditor of the Copper Queen mine, and you had a claim, an indebtedness against them of a hundred thousand dollars, knowing that they were a solvent company, would you be willing to take the Silver Spray hoisting works and improvements for a hundred thousand dollars?

A. If they were indebted to me that much, I would yes.

Q. Would you be willing to take that instead of cash?

A. If they were solvent debtors, they would probably be able to pay the cash.

Q. Don't you understand what a solvent debtor is? Is that your view of a solvent debtor, that he is not able to pay cash?

A. If he is in debt to a person, and he cannot pay the cash.

Q. A solvent debtor could not pay his debts?

510 Mr. ENGLISH: I still insist that this is cross examination and I object to it.

Q. Is it your view that a solvent debtor cannot pay his debts?

The COURT: This is certainly in the nature of cross examination. The question is leading.

Col. HERRING: The question is designed to draw from the witness his basis of assessment. It certainly becomes material. What this

witness, one of the members of the Board of Equalization, considers a solvent debtor. We want to reach a fair interpretation of what was in his mind in relation to this assessment.

The COURT: Many leading questions have been asked this witness without objection, the Court assuming that counsel on the other side considered this witness of an adverse character. That it was his alleged fraudulent conduct that was being inquired into. There is some question whether the plaintiff does not have the right in the examination, to ask leading questions under these circumstances.

Mr. ENGLISH: We object on the ground of immateriality and incompetency. What difference does it make as to what this witness' opinion is as to the proper definition of solvent or insolvent?

The COURT: That is another proposition.

Mr. MCFARLAND: The question is directed to that definition of our statute, that defines what is cash value. Cash value, as defined by the statute, is what any creditor would take any property from a solvent debtor. A solvent debtor is a man who can pay his debts; an insolvent debtor——

511

Col. HERRING: That is highly improper. That is no way for counsel to try a case. For counsel to stand up and inform a witness how to answer.

The COURT: If the witness has a misunderstanding of the general definition of the term solvent or insolvent, and bases his testimony upon wrong understandings of the term, the Court would not do justice unless it considered his error.

The WITNESS: I understood him to say insolvent debtor. I made the mistake myself when I said solvent. I understood him to say insolvent debtor; if they could not pay their debts, and would I take the property for that amount.

The COURT: With this explanation, do you insist upon that question.

Col. HERRING: In view of his explanation, of course, the question is unnecessary. The witness has not been instructed by counsel as to his understanding, but he has been instructed by counsel as to his knowledge. I am seeking to pierce the conscience of this witness, and to get from him a statement of what he regarded a solvent debtor to be. There is no misunderstanding about my language: solvent debtor: nothing in my tongue that would insert an "in" before "solvent", and I object to this method of counsel conducting the case.

512

Q. From what you know of the Silver Spray hoist and improvements, would you, as a creditor, take that property, that hoist and improvements, in payment of a debt due to you from the Copper Queen Consolidated Mining Company, if said company was solvent?

A. No sir, for I have no use for it.

Q. Would you take it for any amount under those circumstances?

A. No sir, I would not, under the circumstances, if I had no use for it.

Q. It is admitted by the answer of the defendants that the hoist and improvements of the Holbrook mine were raised ten thousand

dollars, in addition to what they were returned. Now, Mr. Reay, do you know whether there is any hoist upon the Holbrook?

A. What is commonly called the Holbrook, yes sir.

Q. Do you know of your own knowledge that there is any hoist upon the Holbrook?

A. I could not swear that is the Holbrook, because I do not know the lines of the Holbrook; that is what is called the Holbrook shaft.

Q. You know this hoist, do you?

A. Yes sir.

513 Q. Now, as a creditor of the Copper Queen Consolidated Mining Company, would you take the Holbrook hoist and improvements in payment of a debt due to you, from the Copper Queen Company, if it was a solvent corporation, would you take it for ten thousand dollars?

A. I have no use for it, no sir.

Q. Would you take it for any sum in payment of such debt?

A. I don't know whether I would or not.

Q. Don't you know?

A. I would take it for any sum, yes.

Q. What sum?

A. It is according to what I would want to give for it.

Q. What sum could you afford to give for it?

A. I don't wish to state what I would give for it.

Q. Are you able to state?

A. No, because I have got nothing to give.

Q. If you were a creditor, then you would have something to give?

A. That would be a different proposition.

Q. I am putting just that proposition to you. I am asking you the question whether, if you were a creditor of the Copper Queen Consolidated Mining Company, you have a debt due from the

514 Copper Queen Consolidated Mining Company, for what sum would you take this hoist, in payment of the debt, the hoist and improvements?

A. I could not say, no, I would not say as to that.

Q. Mr. Rear, the admissions in the answer of the defendants, says that your Board raised the buildings and improvements of the company fifty thousand dollars. Upon what basis did your Board make that raise?

A. Simply because we thought the property was that valuable; worth that much.

Q. Who told them so?

A. A person can look at them and see for themselves.

Q. Did you look at them?

A. Yes, I have seen the properties.

Q. Are you a builder?

A. No, I am not a builder.

Q. Never have been?

A. No sir.

Q. Did you consider that a hundred thousand dollars was their value?

A. We did, yes sir.

Q. Then why did you raise it sixty thousand dollars more?

Mr. ENGLISH: More than what?

515 Col. HERRING: Those buildings were returned at $55,431.00, and they were raised a hundred thousand dollars.

Mr. ENGLISH: The raise was made upon the Copper Jack mine.

Q. Now, you consider them worth a hundred thousand dollars, do you?

A. Yes sir.

Q. Those buildings on the Copper Jack mine?

A. Yes sir, on the Copper Jack.

Q. It was after raising those buildings and improvements up to a hundred thousand dollars, that you put fifty thousand dollars on the Copper Jack, wasn't it?

A. Yes sir.

Q. Did you take any evidence about the value of those buildings and improvements on the Copper Jack?

A. No sir, only the evidence of the Board.

Q. Did not Mr. Douglas tell you something about those buildings and their value?

A. I could not say what he did. He spoke something about them.

Q. You disregarded what he said, and stood by what the Board said?

A. Yes sir.

Q. Who, of the Board, spoke to you about those buildings?

516 A. All three members of the Board understand the buildings; have seen the buildings.

Q. Is any member of the Board a builder?

A. I don't know whether they are or not; I could not say as to that.

Q. It appears by the admission of the defendants in this case, that the stock of merchandise in the Copper Queen store and ware-house, was raised $203,520.00. Upon what did you base that raise?

A. On Mr. Douglas' own statement.

Q. What was his statement?

A. His statement was that on the first of February that the stock invoiced something over two hundred and eighty thousand dollars.

Q. Now, isn't it true that Mr. Douglas stated to you, that of this property of which he had the invoices, eighty thousand of that was in transit?

A. No sir.

Q. Was not in the county?

A. He stated that sixty thousand dollars of it was.

Q. Did he not say from sixty to eighty thousand?

A. Sixty thousand.

Q. And yet you added, you made a total raise or total valuation of that property of $367,350.00. In other words, you raised the valuation of that property $203,520, did you not?

517 A. Yes sir.

Q. When you were told that the invoices of that property, by Mr. Douglas, was $297,186.11, less $60,000; that is true?

A. Yes, that is true.

Q. Why did you put the raise on there of $203,520?

A. Because we thought there was more merchandise there, and he didn't have invoices to show there was not.

Q. Didn't Mr. Douglas offer to bring the inventory?

A. No sir, not that I know of.

Q. Why did you think there was more property there?

A. Because they thought there was more there.

Q. Why?

A. I have heard from parties that helped to take the invoice of that stock, that there was more stock there.

Q. Who have you heard say?

A. I have heard from Fred Riley, said so himself.

Q. When?

A. I have heard him say so this year. He was not working for them this year. When he was working for them.

518 Q. He had worked for them this year?

A. No sir.

Q. He didn't say that he took an inventory this year?

A. No sir.

Q. That was not evidence to you, what was done the previous year; it was not evidence as to what was the condition this year?

A. No sir.

Q. Then you didn't base your raise upon his testimony, this year?

A. No sir.

Q. Then, what did you?

—. Simply because we thought they had more stock this year than they had. We asked them to produce the invoices, and they didn't produce the invoices. I told them I would like to have all over $260,000, and they said I could have it by paying for it.

Q. And you thought you would like to have all the property there at $367,395?

A. I don't know as it was raised to that amount?

Q. Your raise was based upon a return of $90,355?

Mr. ENGLISH: I want to call your attention that the return of merchan-ise was something like $76,000.

519 Q. Mr. Reay, when you, as a Board of Equalization, this year considered the valuation of merchandise throughout this county, what average per centage did you estimate as a basis of valuation?

A. The cash value of it.

Q. You mean to say that you assessed everything up to its full cash value, is that true?

A. In mines, it was, yes. Merchandise stock, 75 or 80 per cent.

Q. Merchandise stock 75 or 80 per cent?

A. Yes sir.

Q That was true of your own stock, wasn't it, in Bisbee, your company that you belong to?

A. Yes, a little more so.

Q. And you did that generally throughout this county?

A. Yes sir.

Q. Why did you change that system when you came to a mining company? Do you mean to say that this is the value of the property

of the Copper Queen Company $307,395? Is that based upon the value of the merchandise as returned, or 75 per cent of it?
A. I do, yes sir.
Q. That is what you mean to say?
A. I do, yes sir.
Q. What did you assess patented mines for this year?
520 A. According to whether they were any value or not.
Q. How did you know the value of the patented mines, then, those of the Copper Queen, and some few that you raised; did you make any inquiry?
A. We have, yes sir.
Q. What inquiry did you make?
A. The properties that were not shipping anything, we did not raise, except five dollars an acre.
Q. How did you know what were not shipping or what were shipping?
A. All that we knew of, that were not shipped, were not raised.
Q. Then, it made a difference in the value of mining property whether it was shipping or not shipping?
A. No sir, what we thought the patented mine was worth; whether they were shipping any ore or not; what we thought it was worth.
Q. Did you reflect upon the value in this district, of the Contention mine?
A. Yes sir.
Q. And assessed that at five dollars an acre?
A. Yes sir.
Q. They are not shipping any ore?
A. No sir, they are not doing any work that I know of.
521 Q. You knew that that was a very valuable mine?
A. No sir, I don't know anything about it.
Q. Don't you know that it is common talk that it is a valuable mine?
A. Had been a valuable mine——
Q. Because it was lying idle——?
A. We did not know whether it had any value now or not; we knew it had been a valuable mine.
Q. And you knew that it is in a group that is being improved by putting in a pumping shaft, on the Flora Morrison?
A. Yes sir.
Q. And did you assess the Flora Morrison at five dollars an acre?
A. Yes sir.
Q. Why?
A. Because we didn't think it was worth more than that.
Q. You didn't make any inquiry into its worth, did you?
A. No we did not.
Q. You didn't ask the assessor to inquire did you?
A. We didn't see nothing to assess about it.
Q. Did you think it was worth five dollars an acre?
A. I thought it was worth five dollars an acre.
522 Q. Why?
A. The same as all patented mines.
Q. They are worth five dollars an acre?

A. Yes, ought to be taxed at five dollars an acre, the law gives that privilege.

Q. And the Board proceeded upon that theory; that if a mine was lying idle, then you allowed it to be assessed at five dollars an acre?

A. No sir, just according to its value.

Q. Do you know of the value of the Vista mine, for instance; that is a patented mine, lying idle?

A. Yes sir.

Q Was there any value placed upon it?

A. Five dollars an acre.

Q. Anything more than that placed upon it?

A. If we had known there had been an offer made for it, we might have assessed it more.

Q. You didn't make any inquiries?

A. No sir.

Q. Suppose that it should transpire that at the time that you made the assessment that the Sisna group was under a bond for sale, for twenty thousand dollars, would that have added to your ability to assess?

A. It might.

Q. Suppose you knew that the Contention mine was under
523 bond of sale for over fifty thousand dollars, would that have added more to your value?

A. It might have done so.

Q. You made no inquiry about it?

A. No sir.

Q. You know these mines are in the immediate vicinity here?

A. No sir, I do not know it.

Q. As a miner in this country six years, and as a member of the Board of Supervisors, and Board of Equalization, you do not know the immediate vicinity of the Contention mine?

A. I don't know the mine, no sir.

Q. The Tranquility?

A. No sir.

Q. The Grand Central mine?

A. No sir.

Q. Don't you know that they are in Tombstone?

A. Yes sir.

Q. You were sitting as a Board in Tombstone?

A. Yes sir.

Q. You assessed the Grand Central Mine at five dollars an acre?

A. Yes sir.

Q. Why?

A. The same as we did the balance of the patented mines around here.

524 Q. Because they were lying idle?

A. Because we didn't know it was worth any more than that.

Q. You assessed the mines around here in this district at five dollars an acre?

A. Yes sir.

Q. You didn't make any inquiry as to the Grand Central?

A. No sir.

Q. And you didn't make any inquiry as to any of these patented mines on the hill?

A. I did not.

Q. You assessed the Boss mine at five dollars an acre?

A. I could not say now whether we did or not.

Q. A patented mine, lying idle, you assessed it at five dollars an acre?

A. I could not say whether we did or not.

Q. If you did assess it at five dollars an acre, for what reason did you assess it?

A. Simply because I didn't hear of any other value on it.

Q. You assessed the Good Enough at five dollars an acre?

A. I reckon it was; it must have been if it was assessed.

The COURT: Will this direct examination proceed at some length?

525 Col. HERRING: It will, very likely, consume a half hour.

The COURT: We will take a recess until two o'clock.

Afternoon Session.

DECEMBER 10, 1901.

GEORGE B. REAY, testified on behalf of the plaintiff, on further redirect examination.

Redirect examination resumed by Col. HERRING:

Q. In what mining camps, Mr. Reay, or districts in this county, have you been?

A. None excepting Bisbee, to live there.

Q. How many have you visited?

A. I have been through several of them, yes sir.

Q. What ones?

A. I have been through here at Tombstone, and I have been over as far as Pearce, and that is about all.

Q. Been in the Gleeson camp?

A. I have been through there; just drove through?

Q. Ever been in the Black Diamond?

A. No sir.

Q. Copper Crown?

526 A. No sir.

Q. Have you ever been to the Peabody at Johnson?

A. I have not.

Q. Been to any mining camps in the Huachuca Mountains?

A. I have not.

Q. The Dos Cabezas?

A. No sir.

Q. Now, as a member of the Board of Equalization, this year, your cause—did you inquire of the assessor of the county in relation to his assessment of unpatented mines?

A. No sir.

Q. Why didn't you?

A. It was never brought before us.

Q. They were never brought before you?

A. No sir.

Q. Whom did you expect to bring it before you?

A. We supposed the assessor would do his duty himself, we were not supposed to act as assessor.

Q. Are you not aware that there is a statute that requires you, when the assessor does not do his duty, to require him to do it?

A. Yes sir.

527 Q. And did you inquire of the assessor as to whether he had assessed any unpatented mining claims?

A. I did not.

Q. Why did you not?

A. I didn't deem it necessary; I supposed he done his duty. As I didn't know what other mines there were, unpatented or patented.

Q. Don't you know, as a man living in this county for six years that there are a large number of unpatented mining claims in this county?

A. I suppose there is, yes.

Q. Don't you know that this is a matter of ordinary knowledge in this county?

A. Sure.

Q. A great mineral county, Cochise, isn't it?

A. Yes sir.

Q. And yet none of this large number of unpatented mining claims was assessed?

A. Not that I know of.

Q. Well, you had some returned on the assessor's books for the Copper Bell, did you not?

A. Improvements on the Copper Belle, yes sir.

Q. You didn't assess that as a patented mine, did you?

A. I could not say whether we did or not.

528 Q. Well, I may say to you that the record shows that the Copper Bell is not patented. Now, you assessed the improvements on that, and therefore, you knew that that was an unpatented mine?

A. It must have been.

Q. You must have known it?

A. We must have understood it that way.

Q. Why didn't you assess it?

A. I could not say.

Q. You have no reason to give, further than you neglected to do it, is that it?

A. I could not say that that was it, no sir.

Q. Well, you failed to do it?

A. Yes, failed to do it.

Q. Did you assess any improvements on the Good Hope mine?

A. I could not say.

D. Did you ever hear of that mine before?

A. I don't know as I ever did.

Q. Owned by Mr. Burt Dunlap, I believe?

A. I could not say as I ever heard of the Good Hope mine.

Q. As a matter of fact in those cases where the Board simply assessed the improvements on unpatented mines, they knew then that they had before them a property which was known as an unpatented claim, didn't they?

529 A. I presume they did, yes sir.

Q. The Assessor was with you frequently?

A. He was there, yes sir.

Q. Mr. Reay, if the assessment of u-patented mines was omitted by your Board, was it not apparent to you that the burdens would fall upon other property?

A. Why, as I understood, the burden would fall upon patented properties.

Q. That is the way you understood it?

A. Yes sir.

Q. That is the way you got, you came by that view?

A. That the burden would fall upon patented properties.

Q. That was your view about it, was it? the view of the Board?

A. Yes, the view of the Board.

Q. And that govern-d the action of the Board in such assessments?

A. I did, yes sir.

Q. How long have you been a Supervisor, Mr. Reay?

A. Since the first of January, 1901.

Q. When did you first commence to discuss the assessments or the raises of the Copper Queen properties?

530 A. Commenced to discuss it. It was never discussed until the Board of Equalization met.

Q. Did you say, sir, that you never discussed it until the Board of Equalization met?

A. No sir, we did not.

Q. You say that you did not discuss it with anybody until the Board of Equalization met?

A. I say it has not been discussed with anybody.

Q. Until the Board of Equalization met?

A. Yes sir.

Q. Have you discussed the question at all? before the Board of Equalization met, of raising the values of the Copper Queen properties?

A. I might have done so, yes, but not as a Board.

Q. Do you remember with what persons you discussed it?

A. I could not say, no.

Q. Why did you discuss that question before the Board met?

A. Just general topic, was all, speaking of different properties, yes sir.

Mr. McFarland: I object. This is wholly immaterial. It does not make any difference whom he discussed the matter with. The question here is, what were the reasons that induced the Board to raise the property. The Board only speaks by its records. I

531 only object in behalf of time; that question is wholly irrelevant and immaterial, and don't bear reference at all to the issues in this case.

Col. HERRING: I think they bear a very material issue; being the motives of these parties inquired into; what they did.

The COURT: The Court is very desirous of making progress in this case, giving every consideration, however, to the rights of the litigants. This witness has testified in effect that his actions as a member of the Board of Equalization was governed to some extent by his own knowledge; knowledge acquired, to some extent, before the Board met. And in view of the allegation of fraudulent conduct, I am not desirous to place any particular restriction upon the scope of this inquiry. I hope, however, that it will not be pursued beyond reasonable limits.

Col. HERRING: We avow ourselves desirous of expediting this case as much as anybody can.

Q. Were you speaking of these Copper Queen properties where the raises were made?

A. Where the raises were made, I suppose so, yes sir.

Q. Did you have any conversation with Mr. English here, directly?

A. No sir.

Q. None at all?

A. None at all, no sir.

532 Q. Did you have any conversation with Mr. York?

A. No sir, not that I know of.

Q. Did you have any correspondence with anybody outside of this county, in relation to what was claimed to be the duty of this Board, to put these properties up?

A. No sir.

Q. Was there any such correspondence shown you by any of the Board?

A. No sir.

Q. Or talked of?

A. No sir.

Q. Do you know Mr. Burns of Mohave County or Yavapai County, a member of the last Legislature?

A. I have seen him, yes sir.

Q. You know him, don't you?

A. I do not, personally, just to meet him.

Q. Ever have any talk with him about taxation?

A. I could not say as I have.

Q. Can you say that you did not?

A. I could not say whether I have or not, in regard to taxation.

Q. Have any intimation from any source outside of Cochise County of the intention to raise taxes generally in the Territory?

533 A. No sir.

Q. None to raise taxes generally in the Territory? Or to raise taxes in any particular counties?

A. I had a talk with one of the members of the Board of Supervisors of Yavapai County—we were talking matters over.

Q. Where did you have that talk?

A. In Phœnix.

Q. And that was with a view of your co-operating?

Mr. McFARLAND: I submit that the conversation would be the best evidence.

Q. With a view of co-operating with the Board of that County in raises?

A. No sir, I was speaking as an individual, not as a member of the Board of Supervisors.

Q. Then, as an individual, in raising the taxes?

A. They were telling us the taxes they placed on property there, that is all.

Q. When was that?

A. That was last February.

Q. In this year?

A. Yes sir.

Q. And the question as to what they were going to put on the Verde was up, wasn't it?

A. That was up at the time, yes sir.

534 Q. And he told you what he proposed to do?

A. Not exactly.

Q. But generally, what they might do.

A. What they might do, yes.

Q. And generally you talked about the properties of the Queen?

A. We did not say anything about raising the properties of the Queen.

Q. But you talked about the properties of the Queen?

A. Yes sir.

Q. The subject of taxation, however, was under consideration?

A. It was at the time, yes sir.

Q. And you and he agreed pretty well, didn't you, at that time?

A. We agreed on some points, yes, on others we did not.

Q. As to the raises on property?

A. I would not say that we agreed on raises on property, whatever, no sir.

Q. Not as to amounts, but as to the general theory?

A. We might have done so, yes.

Q. And you had that in mind when you sat as a member of the Board of Equalization?

A. No sir, I did not have it in mind at that time whatever.

535 Q. No, none at all?

A. No sir.

Q. It didn't effect you at all?

A. No sir, it did not.

Q. Did you afterwards learn what they had raised the value in Yavapai County at?

A. No sir, we did not.

Q. Never learned that?

A. No sir.

Q. Did you ever learn that?

A. Have not learned yet, no.

Q. Have not learned yet?
A. No.
Q. If they did not raise it, that would be a good reason why you have not learned it?
A. It might have been, yes.
Q. You know they intended to raise it?
A. Their intentions were to, yes.
Q. And you intended to raise it here, didn't you?
A. I would not say as to that.
Q. Didn't you intend to raise these properties?
A. I never made up my mind until the Board of Supervisors met.
Q. Did not you, ever?
A. No sir, I did not.

536 Q. Were you not disgruntled and disturbed about some political matters; were you not influenced by some matters arising in the election of yourself as Supervisors, which embittered you against the Copper Queen people?
A. No sir, I was not.

Objection. Objection overruled. Exception.

Q. And have you not made statements to that effect?
A. I have made no statements that the members of the Copper Queen Company had anything to do with my election whatever.
Q. Have you made any statements about your getting even with the Copper Queen people?
A. No, sir, I have not.
Q. Or what they deserved, or something of that kind?
A. No sir.
Q. You have no recollection of such statements?
A. No sir.
Q. You know D. Ford Jones, do you not?
A. Yes sir.
Q. Connected with the Copper Queen Company?
A. Yes sir.
Q. Do you know Mr. Ellison also connected with that company?

537 A. I do, yes, sir.
Q. Do you know Mr. Fenner who was connected with the Lowell & Arizona Mining and Smelting Company?
A. I have met him, yes, sir.
Q. Did you ever have any talk with him about the Lowell & Arizona taxes?
A. Over the telephone, yes, sir.
Q. Well, over that telephone, did he ask you if the taxes on that property, of the Lowell & Arizona, could not be reduced?
A. He was talking to me over the phone about it, yes.
Q. Did you tell him that you were going to make them stick?
A. I told him that I was not acting as the Board of Supervisors then, that the Board would meet, and if he wished to, he could go there and make a statement before the Board.

Q. Didn't he tell you before the Board there that this property was a matter that his company would have to pay taxes on?

Mr. McFARLAND: May I ask the object of this question?

Col. HERRING: I will ask the question, and you can object to it.

Q. Did you have a talk with him, and in this talk over the telephone did you not say to him—did he not say to you that this
538 is a Lowell & Arizona matter, and my company will have to pay the taxes; didn't he inform you to that effect in that conversation?

A. He informed that, yes.

Q. And then did you not say to him: Oh, that is a different matter; I thought the Copper Queen would have to pay the taxes?

A. No, sir, I did not.

Q. You say that you did not say that?

A. I say I did not.

Q. Did you say you could fix it up for him all right?

A. I told him that we would find out what was done before the Board and notify him.

Q. Didn't you tell him you could fix it up all right?

A. No, sir.

Q. Or straighten it out?

A. I told him we would try and straighten it out, if he would appear before the Board.

Cross-examination by Mr. ENGLISH:

A. He was speaking that his company would have to stand for them taxes, and I told him if he would appear before the Board we might straighten the matter out for him before the Board. I
539 was acting as an individual; I was not acting as a member of the Board then; the Board was not sitting then.

Q. Have you any feeling of enmity, or do you possess any feeling of enmity against the Copper Queen Company, or its management, in the year past?

A. No sir, I have not.

Q. When you left the employ of that company, state whether it was at your own volition, or whether you were discharged?

A. Of my own volition.

Q. Upon what terms were you with the company and its management during the time of your employment with it?

A. On the best of terms.

Q. You have been asked by Col. Herring whether you or the other members of the Board of Equalization made any effort to procure any information of the values of the mining property assessed to the complainant here. Is it not a fact that you made an effort to get an idea and an estimate of those values from Superintendent Walter Douglas?

A. We did, in the Supervisors' room.

Q. Did he give you any information in regard to the values?

A. He did not, no sir.

540 Q. Have you seen ores hoisting from the Spray or the Holbrook mines, during the current year, or the present year?

A. No sir.
Q. You have not been up there?
A. I have not been up there.
Q. Have you seen any bullion or matte being shipped from the smelters and converters of the Copper Queen Company this year?

Col. HERRING: Objection; irrelevant, immaterial and incompetent.
The COURT: Objection overruled.
Col. HERRING: Exception.

A. I have passed down the railroad track and saw cars there loaded with bullion, in front of the smelter.
Q. Do you know about how many cars of bullion on an average they ship per day from the smelter?

Col. HERRING: Same objection.
The COURT: Objection overruled.
Col. HERRING: Exception.

A. I could not say, no sir.
Q. They were shipping copper bullion right along though, aren't they?
A. I believe so.
541 Q. You have been asked about the buildings on the Copper Jack mine belonging to the complainant. You have viewed those buildings have you not?
A. I have, yes sir.
Q. Familiar with them?
A. I have been in one or two of them.
Q. They were built of brick and stone?
A. They are, yes sir.
Q. And fastened to the soil of the mine, a part of the surface ground?
A. Sure.
Q. What do they consist of?
A. What do you mean?
Q. What do these buildings consist of; how many are they; how large are they; what are they used for?
A. One is a store building, used as a general store, underneath is a ware house.
Q. How much of a building is that store building; about what are its dimensions?
A. Well, about fifty by one hundred feet; I could not say for sure.
Q. How high?
A. Two stories, the store building is.
Q. Of what is that constructed?
A. Three stories, stone and brick, cellar is under.
542 Q. What other buildings are there on the surface ground of the Copper Jack?
A. Across the street is another building, two stories, and over that is the company's office; then there is another ware-house back of the depot that is used for grain, etc.

Q. There are a great many large and valuable buildings situated upon the Copper Jack mine, is there not?

A. Yes sir.

Q. If you owned the Silver Spray mine, and the Copper Queen owed you a hundred thousand dollars, would you then give a hundred thousand dollars, or take the Spray hoist in liquidation of such an account?

A. I would if I owned the mine, yes.

Q. In other words, if you had use for that hoist, you would consider it worth a hundred thousand dollars?

A. Yes sir.

Q. How about the Holbrook hoist, if you had use for it, would it be worth a hundred thousand dollars to you?

A. The improvements on the Holbrook, I would, yes.

Q. You have spoken about the testimony given by Mr. Douglas before the Board of Equalization, in which he told the Board that the goods which were in the store and ware house in Bisbee
543 were valued at some two hundred and eighty thousand dollars on the first of February?

A. Yes, sir.

Q. In making that statement, did he use the word that they invoiced or inventories that?

A. The inventory on the first of February, two hundred and eighty thousand dollars; something to that effect.

Q. Do you understand that an inventory of merchandise includes goods in transit, or that which is visible, in sight, in possession?

A. No sir, it don't include goods in transit; I would say.

Q. That the goods in the Bisbee store were worth two hundred and eighty thousand dollars. That is what you understood him to say; inventoried that?

A. Yes sir, inventoried that.

Q. He has spoken about a large number of unproductive mines in this county, which were equalized uniformly at five dollars an acre. Is it not true that the vast majority of the patented mines owned by this plaintiff were likewise so listed at five dollars an acre, and equalized at such price?

A. Yes sir.

Q. And it was only a few of the productive mines which keep their large smelting works and reduction works running, to
544 which assessment there was added an amount by the Board of Equalization?

A. Yes sir.

Q. State whether you understood, as a member of the Board of Supervisors and the Board of Equalization of the county, whether an unpatented mining claim was subject to taxation in the Territory or not?

A. I didn't understand it that way, no sir.

Q. How did you understand it?

A. We understood that unpatented property was not taxable.

Q. But that the improvements thereon were?

A. Yes sir.

Q. Did you ever read the statutes on that subject?
A. I never did, no sir.
Q. State whether, as a member of the Board of Equalization, you ever voted to place a value upon any taxable property within this county, at a figure beyond what you honestly believed to be its cash value?
A. No sir, I did not.
Q. Whether it belonged to this complainant or any other person or company?
A. No sir, I did not.
Q. You have stated that you believed that the Board of
545 Equalization, in equalizing values of stocks of merchandise throughout the county, put on a value of seventy-five per cent?
A. Yes sir.
Q. Why did you put the value of seventy-five per cent on it?
A. Because a great deal of merchandise decreases in value.
Q. In putting seventy-five per cent on merchandise at that time, you assumed them, that it would be the cash value of it, before the close of the fiscal year?
A. Yes sir.
Q. Was there any discrimination made against the merchandise of this complainant?
A. Not that I know of, no sir.
Q. Assessed in the same manner as that of property of any other tax payer?
A. Yes sir.
Q. Did you raise the returned list of merchandise of any of the merchants of Tombstone?
A. Yes sir.
Q. What did you raise them for?
A. Because we thought they had more merchandise than what they returned the list in for.
Q. And the Board put it up to the same general average as that of the Copper Queen, in proportion?
A. Yes sir.
546 Q. That was done in Benson and Wilcox too?
A. Yes sir.
Q. What other mines, outside of this complainant, were raised by the Board of Equalization, the value?
A. The Calumet & Arizona.
Q. How much were they raised?
A. I don't remember just now the exact amount.
Q. About how much?
A. I could not say just the exact amount of the Calumet & Arizona.
Q. Any others?
A. There is the Peabody.
Q. How much was that raised?

A. I think it was raised. I would not state the exact amount; it was raised.

Q. Was it a hundred thousand dollars?

A. I could not swear it was a hundred thousand or more; I have not paid any attention to it.

Q. Was not the Mammoth raised also?

A. The Mammoth was raised.

Q. And the Commonwealth?

A. Yes sir.

Q. The Commonwealth was raised some four hundred thousand dollars?

A. I think it was.

547 Q. And the Commonwealth and the Copper Queen were the only companies that brought suits and made a protest, to enjoin the collection of the tax, out of all those that were raised.

A. Yes sir.

Q. State if it is not a fact that the Board of Equalization raised the values on all mines, indiscriminately, without discrimination of one against the other, where they found that the returned value was less than the real value of such property?

A. They did, yes sir.

Q. And that was the reason the property of the complainant was raised above the assessed value, and the only reason wasn't it?

A. Yes sir.

Q. Is it not a fact that Walter Douglas refused to give the Board of Equalization any information in regard to the value of the mines of the complainant?

A. He did.

Q. When he was before you last July?

A. Yes sir.

Q. Was he asked as to the value of the property?

A. He was.

Q. Each different mine?

A. I believe he was as to some of the mines.

548 Q. The particular mines to which large sums were added to the returned value as was listed?

A. Yes sir.

Q. Was he not asked in regard to the value of all the properties of his company in this county, the total value; the aggregate value?

A. I believe he was.

Q. What was his answer to that?

A. He did not care to give the Board that information.

Q. He could not do it?

A. He did not care to give the Board the information.

Q. Was he not asked in regard to the production of the mines of the company?

A. Yes sir.

Q. Did he answer that question?

A. Have to refer it to the New York office.

Q. Was he asked in regard to the cost of mining and reducing ores in Bisbee of this company?

A. I could not say as to that.

Q. Was he not asked in regard to the net profits arising from the working properties belonging to his company in this county?

A. I believe he was.

Q. What reply did he make to that?

A. The same as regards the out-put, we would have to apply to the New York office.

549 Q. He didn't answer the question?

A. No sir, he did not answer the question.

Q. Did he not tell the Board that he regarded this information—that they were not entitled to this information, and he was not entitled to impart it?

A. I could not swear as to that that he was not entitled to impart it. When the Board asked him what was the value of the property, he said he didn't think he was in a position to give the Board that answer.

Q. And he didn't give that answer?

A. He didn't give the answer, no sir.

Q. And all this occurred at the time that he was before the Board in *pursuit* to notice given him by the Board that the Board intended acting upon the equalization of his company's property?

A. Yes sir.

Redirect examination by Col. HERRING:

Q. When Mr. Walter Douglas was asked before the Board to state the values of the properties of the Copper Queen Company, did he not tell you that he did not know?

A. He said he didn't care to give the Board that information.

550 Q. My question to you now is direct. Did he not tell you he did not know?

A. No sir.

Q. That is your recollection of it?

A. That is my recollection of it.

Q. In referring you to the New York office, did he not say that he did not have the knowledge of that office, to answer the question?

A. I did not understand him that way.

Q. You say that the Peabody mine—that the value of that was raised from five dollars an acre?

A. Yes sir.

Q. That is your recollection too?

A. Yes sir.

Q. Now, you stated that you raised the Commonwealth, the value of the Commonwealth mines four hundred thousand dollars, up to four hundred thousand dollars? What did you reduce it too? Did you reduce it after that?

A. I don't think so.

Q. You say it stands now at four hundred thousand dollars?

A. I could not say just exactly what it does stand at.

Q. Did you reduce that raise at all?

A. Not that raise, I don't think we did.

Q. None of the raises on the Commonwealth properties were reduced?

551 A. The first proposed raise was reduced, yes.

Q. What was the first proposed raise?

A. I think it was somewheres in the neighborhood of a million dollars.

Q. You gave notice of that, a million dollars?

A. I think so.

Q. Why did you reduce that?

A. From the information received from the Commonwealth people.

Q. Did you know anything about the output of the Commonwealth?

A. No, we did not understand anything about the output, except the testimony given us by them.

Q. They didn't tell you, did they?

A. They didn't tell us the exact output, no sir.

Q. And yet you reduced their valuation from a million dollars to four hundred thousand dollars?

A. Yes sir.

Q. You reduced it sixty per cent of the value which you put upon it. Now, the Calumet & Arizona, did not you raise that first— did you not have a large proposed raise upon that?

A. Yes sir.

Q. Did you reduce that?

A. We did.

Q. Why?

552 A. Because the mine was not paying; it was not out-putting. The mine was not paying.

Q. That is the only reason?

A. Yes sir.

Q. Did you ever examine whether they had large bodies of ore?

A. I never did, no sir.

Q. Ever cause any examination to be made?

A. No sir.

Q. As to bodies of ore?

A. No sir.

Q. Ever cause any examination to be made as to the value of their bodies of ore?

A. No sir, I did not.

Q. Heard any evidence upon that subject?

A. No sir.

Q. What did you reduce them?

A. I could not say exactly.

Q. Didn't you reduce them from five hundred thousand to ninety thousand dollars?

A. We made a reduction, a great reduction, I know, but I could not say just the exact amount.

Q. About that amount wasn't it?

A. About that?

Q. And every time you made those reductions you knew that you

were adding to the burdens of the Copper Queen mine, did you know?

A. No sir.

553 Q. You did not?

A. No sir.

Q. You had already had them assessed at three millions, one hundred and fifty thousand dollars, just the naked mines, eight mines?

A. Yes sir.

Q. And when you reduced these values from the other mines, you did not know you were adding to the burdens of the Copper Queen?

A. Because we thought the property was worth it.

Q. You say you didn't know you were adding to their burdens of taxation, of the Copper Queen Mining Company, when you reduced those other mines?

A. No sir.

Recross-examination by Mr. *Eng* ENGLISH:

Q. Mr. John Brockman appeared before the Board of Supervisors and gave testimony in regard to the out-put of the Commonwealth mines?

A. He gave testimony before the Board, yes sir.

Q. Told the Board what his ores were running?

A. Yes sir.

Q. What they run per ton?

554 A. He did, yes sir.

Q. The reduction was made to correspond to the true value of his property?

A. Yes sir.

Q. Showed his assays to the Board?

A. Yes sir.

Q. Mr. Merrill for the Calumet & Arizona property, adjoining the Copper Queen, appeared before the Board?

A. He did.

Q. Gave testimony before the Board in regard to the value of the property?

A. He did.

Q. And did you place the values, as the Board of Equalization on the Calumet and Arizona property, below their true cash value, as you found it to be, or at their true cash value?

A. We didn't place it below.

Q. At what you found to be the true cash value?

A. Yes sir.

Q. And likewise with all other properties?

A. Yes sir.

Redirect examination by Col. HERRING:

Q. Did you have before you any record of what the Calumet & Arizona paid for the property?

555 A. No sir, we did not.

Q. Didn't have inquiry made?

A. I cannot say that we did.
Q. And Mr. English did not suggest that you bring up those records?
A. No sir.

Recross-examination by Mr. ENGLISH:

Q. Did you have the records before you as to what the Copper Queen paid for the Lowell & Arizona?
A. Yes, from the Recorder's office; the records of what they paid for the property. Only in regard to stamps in the Recorder's office.
Q. You found that to be five hundred dollars on the deed, didn't you?
A. Yes sir.
Q. Representing a value as paid by them of five hundred thousand dollars?
A. Yes sir.
Q. And afterwards Mr. Walter Douglas' statement in response to the value of that property, you reduced it to fifty-four thousand dollars; from Mr. Douglas' statement?
A. Yes sir."

556 The witness was now excused, and other evidence introduced, and said witness again recalled for further cross examination by Mr. McFarland, which said cross examination is as follows:

"Col. HERRING: I understand that the counsel avow that the witness is called for further cross examination?
Mr. ENGLISH: I think it is more strictly in rebuttal of the witness Ellison rather than cross examination.
Col. HERRING: Have you concluded your case otherwise than on rebuttal?
Mr. ENGLISH: It is in rebuttal.

Examination by Mr. ENGLISH:

Q. Mr. Reay, last evening did you hear the evidence of Mr. Ellison of the Bisbee Improvement Company?
A. I did, yes sir.
Q. In which he testified that on Allen Street in the City of Tombstone, sometime last summer in front of Wentworth's place of business, he heard you remark in answer to some question either by himself or some other person that you did not care, that you had the Copper Queen Company cinched already. Did you make to him or to any other person at that time, or at any other time or at all that remark?

557 Col. HERRING: Objection, as not rebutting testimony, and on another ground that that is not the language used by the witness Ellison.
(The testimony of the witness Ellison on this point read by the reporter.)

Q. Did that conversation occur?
A. No sir, it did not.
Q. Did any conversation occur between Mr. Ellison and yourself, or between any other person and yourself in Mr. Ellison's presence or hearing regard- the Copper Queen Company at that time?
A. No sir.

By Col. HERRING:

Q. Do you remember the occasion referred to by Mr. Ellison in his statement?
A. I remember talking to Mr. Ellison in regards to the Bisbee Improvement Company's assessment.
Q. Where were you?
A. We were up on the main street, up there some place in front of Moore's saloon, or in front of Wentworth's saloon, I could not say which one.
Q. The conversation you are referring to then was in front of the saloon?
A. I think it was there some where.

558 Mr. ENGLISH:

Q. Do you know where Mr. Wentworth's place of business is?
A. Yes sir.
Q. Where is it?
A. It is in the place formerly run by Martin Costello.
Q. What kind of a place of business is it?
A. Saloon.
Q. Does he run any other business in town that you know of?
A. Not that I know of.

Mr. ENGLISH: The defendants rest."

Attached to said transcript in which said evidence was, appears the following certificate by the Official Court Reporter, to-wit:

"In the District Court of the First Judicial District of the Territory of Arizona, in and for Cochise County.

559 COPPER QUEEN CONSOLIDATED MINING COMPANY, Plaintiff.
vs.
THE COUNTY OF COCHISE and M. D. SCRIBNER, Treasurer and ex-Officio Tax Collector, Defendants.

Reporter's Certificate.

I, Francis M. Hartman, Court Reporter of the First Judicial District of the Territory of Arizona, in and for Cochise County do hereby certify that I was present at the trial of the above styled cause on December 9th, 10, and 11th, 1901 in said Court. That I took down in shorthand all the testimony adduced at said trial; that I have transcribed the same, and that the foregoing three hundred and

sixteen (316) typewritten pages contain a full, true and correct transcript of said shorthand notes, and all of the oral testimony adduced at said trial.

Witness my hand this 21st day of December, 1901.

FRANCIS M. HARTMAN,

Official Court Reporter, First Judicial District of the Territory of Arizona, in and for Cochise County."

J. N. GAINES, being called as a witness on behalf of the defendants, and having been duly sworn according to law, testified as follows:

560 Direct examination by Mr. ELLINWOOD:

Q. Mr. Gaines, you are the Treasurer and ex-officio Tax Collector of this county?

A. Yes sir.

Q. And as such, you have the custody of the duplicate assessment roll of the county for the year 1901?

A. Yes sir.

Q. Have you examined this duplicate assessment to ascertain the number of patented mines that appear assessed in this county for the year 1901?

A. Yes sir.

Q. At what rate were they assessed? How many were there?

Mr. CLARK: We object to that.

Q. How many were there?

Mr. CLARK: We object to that as immaterial, unless it is shown that the same class of mines as the Copper Queen mines are shown by this testimony to be.

The COURT: The question may be answered.

A. Why, I can find two hundred and eighty.

Q. At what were they assessed?

Mr. CLARK: We will object; the record should speak as to that.

561 A. I don't believe I looked that up; I didn't look that up to see how they were all assessed.

Q. That is already in evidence any way; the duplicate assessment roll shows the raise of some mines?

A. Yes sir.

Q. How many?

A. Well, I don't remember how many mines are raised. I can tell by looking at the book; I have them marked so that I can see it.

(Witness examines book.)

A. Twelve mines.

Q. To whom were those mines assessed that were raised?

A. Eight of them to the Copper Queen Consolidate Mining Company, and one of them was the Commonwealth Mining Company, and one to the Dragoon Mining Company, and two to the Russellville Consolidated Copper Company.

Q. The two hundred and seventy-two mines that you have testified about, patented mines upon the duplicate assessment roll which were not raised, in what manner were they assessed?

A. Well, I will have to look through and see.

Q. I am trying to get at the question of whether it was by acreage?

A. All the assessment appears here to be by acreage.

Q. How much an acre?

562 Mr. CLARK: We object.

Mr. ELLINWOOD: He has the record in front of him.

Mr. CLARK: It don't make any difference whether they are of record or not, unless it is shown that they are of the same class as the Copper Queen mines.

The COURT: Objection overruled.

Q. What does it appear?

A. The Russelville Consolidated Copper Company, some of them.

Q. I am speaking of how they were assessed?

A. A little over five 19 and 14-100 assessed at a hundred dollars. It was assessed so as to make it even money, that is the way that runs there. I find another mine here assessed at about the same ratio, either a little over or a little under five dollars an acre, and several others about the same way.

Col. HERRING: This is, twenty acres assessed at a hundred dollars?

A. Yes, and as the acreage increases, it seems that they increase.

Q. If you can locate enough of them to tell how they were assessed, I wish you would do so.

Mr. CLARK: It occurs to me that the counsel is now trying to prove the custom by a record, a thing which we have been insisting all the time.

563 The WITNESS: The land of the Commonwealth was at five dollars an acre.

Q. As far as you have looked through the books, that is the way they are assessed, at five dollars an acre?

A. Yes, sir.

Q. Disregarding the fractions?

A. Yes.

Mr. CLARK: That is a conclusion; we say that the fact only should go into the record, and not the conclusion of the Clerk of the Board.

The COURT: Let the facts go in.

Q. Well, what else do you find?

A. These mines here assessed to A. H. Emanuel, the Sidney mine.

Q. How many acres?

A. 13 and 85-100.

Q. Value of real estate?

A. $70. Eula mine, 15 and 81-100 acres $75.00. Beunavista 22 and 25-100 acres.

Q. How much was the value?

A. $100. And the Southern Bell mine, 15 and 80-100 acres. Rattler mine, 18 and 96-100 acres, $95.00. Sweet Nut, 20 acres assessed at $100.00. Two mines assessed to A. R. English, Big Pedro, 12 and 64-100 acres.

Mr. CLARK: Patented mines?

A. I presume so.

564 Mr. CLARK: We object unless the record shows that they are patented mines.

Mr. ELLINWOOD: There is nothing but patented mines assessed. That was the evidence of Mr. Fife, he said nothing but patented mines were assessed.

Mr. CLARK: Mr. Fife disqualified himself from testifying about anything. I object to counsel assuming there was any weight to this testimony. We object; it is not shown that they were patented mines. These mines that we are contesting about show that they were patented mines.

Mr. ELLINWOOD: Further, the description here shows the lot number, and that is the only way you can have a lot.

The COURT: Read it into the record.

Mr. ELLINWOOD: (Reading) "A. R. English, 359, Big Pedro Mine, lot number 94, number of acres, 12-64-100. Little Pedro mine, lot number 96, number of acres, 14-40-100. Value of real estate, $140.00.

The WITNESS: The Dean Richmond mine, lot 39, 20 acres, $100.00.

Q. Value of real estate?

A. Value of real estate, $100.00. The Old Guard mine, assessed to Henry M. Gee, number 181, 20 and 55-100 acres. Value of real estate, $105.00. Grand Central Mining Company. Grand Central mine, lot No. 42, 20-22-100 acres; Alke mine, lot 43,

565 15-67-100 acres; Naumkeo, lot 44, 11-53-100 acres; Extace mine, lot 77, 14-62-100 acres; Shorte, lot number 80, 1-08-100 acres; Grand Dipper, lot 148, 17-29-100 acres; Tripple X, lot number 152, 15-27-100 acres; Brother Jonathan, lot number 153, 17-28-100 acres; Maine, lot 154, 19-19-100 acres; Emerald, lot 157, 15-27-100 acres; Revenue, lot number 158, 15-16-100 acres; Hidden Treasure, lot number 209, 18-57-100 acres; Contact, lot number 175, 20-06-100 acres; Mexican, lot number 176, 3-94-100 acres; Moonlight, lot number 177, 66-1000 acres; Silver Thread, lot number 183, 2-12-100 acres; Chance, lot number 187, 20-66-100 acres; Standard, lot number 192, 19-49-100 acres; Last Chance No. 2, lot number 194, 3-24-100 acres; Cocopah, lot number 82, 15-75-100 acres; Central, lot number 182, 18-86-100 acres; Lowell, lot number 189, 20-59-100 acres; North Point, lot number 193, 9-56-100 acres; Boss, lot number —, 5-38-100 acres; Silver Plume, lot number 65, 12-13-100 acres. Values of real estate of the group $1,665.00. That is enough, I guess, to give an inkling.

Mr. CLARK: We move that it be stricken out on the ground that none of the claims assessed, to which evidence has been offered, are

shown to be producing mines, or that they are in the same class of the Copper Queen Consolidated Mining Company, and for the further reason that the testimony goes to an attempt on the
566 part of the defendant to show an over-valuation on these mining claims, which we say, cannot be done under this action.

The COURT: The objection will be overruled for the time being.

Mr. ELLINWOOD: We rest.

And the defendants here rested their case.

Mr. CLARK: We desire to prove that the Peabody, owned by the Dragoon Mining Company, which was testified to by Mr. Gaines, was raised to fifty thousand dollars. We also desire to prove by Mr. Gaines, or the record, that the Russellville Consolidated Mining Company—two mines owned by the Russellvile Consolidated Mining Company, known as the Mammouth and the Republic were each raised to twenty-five thousand dollars, and that the Silver Lead, owned by the Commonwealth Mining Company was raised to fifty thousand dollars, and that the Calumet & Arizona Mining Company, but I don't know to what figure. If you will admit those raises were made.

Mr. ELLINWOOD: We will not admit it, and we will object to it when it is presented and it seems to me that it is absolutely objectionable for the plaintiff to show here that some other particular mining company may have gotten into the same trouble, and
567 so far as the Commonwealth Mining Company is concerned, I know nothing about that, but that tax was set aside in this Court. Now, if they have unjustly raised the mines of the Copper Queen, it is no answer to show that they have unjustly raised somebody else's without showing the value of those claims, without showing the merits or the conditions.

Mr. CLARK: We are offering it to show that mines of the same class as the Copper Queen Consolidated Mining Company in the County of Cochise were not assessed on the acreage basis, and we are undertaking to prove that the custom which counsel is endeavoring to show of assessing mines at five dollars an acre extended to none of the producing patented mines, but non-producing mines, and for the further reason that this company was not singled out, as it is attempted to be shown.

The COURT: You will have to make your proof unless the fact is admitted.

H. E. BERNER, being called as a witness on behalf of the plaintiff, and having been duly sworn according to law, testified as follows:

Direct examination by Mr. CLARK:

Q. You may turn to page 17 and state what there appears as to the action of the Board in raising the valuation of any patented mines in this County for the year 1901?

568 A. There seems to be a list on page 17 of mines of the Commonwealth Mining Company.

Q. And what action was taken in reference to the Silver Wave Mine?

A. The Silver Wave mine was raised two hundred thousand dollars.

Mr. ELLINWOOD: Can you state, Mr. Berner, what it was assessed at in the first place?

The WITNESS: I can't without referring.

Mr. ELLINWOOD: Will you please refer?

Mr. CLARK: That will come in cross-examination, Mr. Ellinwood.

Q. Now, have you the action of the Board in relation to the Russellville Consolidated Copper Company? That is on either page 19, 20 or 21, or some where along there, or turn to the next one?

A. The Calumet & Arizona Mining Company on page 18.

Q. What action was taken?

A. The Irish Mag Mine was raised fifty thousand dollars.

Q. Patented mine? Well, I will take that for granted as counsel did.

A. Fifty thousand dollars.

Q. Yes, and any others?

A. There is in that group.

Q. Name them?

569 A. Senator mine, ten thousand; Senator Number Two.

Q. How much?

A. Ten thousand.

Q. Any others?

A. Hope mine five thousand.

Q. Hope five thousand?

A. Yes, sir.

Q. Any others?

A. Wagner five thousand.

Q. Wagner?

A. Yes, sir.

Q. Any others?

A. Buckeye mine five thousand.

Q. How much?

A. Five thousand.

Q. Any others?

A. Pride mine five thousand.

Q. Pride?

A. Yes, sir. And Gibraltar five thousand.

Q. All in the group?

A. Yes, sir.

Q. Any others?

A. The Russellville Consolidated Company, found on page 20 and 21.

Q. Yes, what was done with those?

570 A. It says here it was proposed to change and correct the valuation of said company's properties, as the same appears upon said assessment roll, by adding thereto the sum of $51,450.00, and they go ahead and list the mines, beginning with the Mainmouth mine.

Q. What was done with the Mammouth?
A. Twenty-five thousand dollars.
Q. Raised to twenty-five thousand dollars?
A. Raised to twenty-five thousand.
Q. All right.
Q. No, I understand that is the raise.
Q. That is the raise?
A. I will read to you their minutes of the Board: "And the Board being now advised in the premises, finds it necessary to add to the assessed valuation of the property of said company on the assessment roll as follows: Mammouth mine, $25,000.00."
Q. Any others?
A. Republic Mine, $25,000.00. That is all the raises.
Q. Turn, if you will, to the Peabody, the Dragoon Mining Company?
A. The Dragoon Mining Company, and as to the Peabody, in the first place it says: "On motion of Supervisor George B. Reay, seconded by P. J. Delehanty, the following raises were added
571 to the assessment of the Dragoon Mining Company; Peabody mine, $50,000.00," and the rest of it is hoisting works, etc.
Q. I don't care anything about that. Now, I think that is all, Mr. Berner.

Cross-examination by Mr. ELLINWOOD:

Q. Mr. Berner, do you know what these mines were assessed at by the assessor?

Mr. CLARK: Now, we object, if your Honor please, for this reason: It does not make any difference what they were assessed at by the assessor, because if the valuation was raised at all in any legal manner, why, that was the ultimate assessment of the property, and it shows conclusively that the system of valuing mines at five dollars per acre did not prevail; at least, as to these during that year, and that the Copper Queen Company was not the only one that had that trouble in this county.
The COURT: I don't see the materiality of it; the presumption is that they were assessed at the flat rate of five dollars per acre.

Q. The property of the Commonwealth Mining Company, don't you know as a matter of fact that that assessment was set aside?
A. I don't know it.

572 Mr. CLARK: We will object to that; it don't make any difference what finally happened; this is what the assessing officer did. The Court records will be the best evidence.
The COURT: The evidence may be admitted to establish that fact.
Mr. CLARK: I have the further objection. The defendant is here trying to set aside this assessment.
Mr. ELLINWOOD: That is all, Mr. Berner.

Witness excused.

Mr. CLARK: I believe that is all the testimony, if Your Honor pleases.

And the plaintiff here rested in rebuttal.

And this was all the evidence.

The following copies of Plaintiffs' Exhibit "B," being the Assessment Roll of Cochise County, Arizona; Exhibit "C," being the Duplicate Assessment Roll; Exhibit "F," being the Delinquent Tax Roll, and "Exhibit G," being the Back Tax Book, all for the year 1901, are now on this 16th day of October, A. D. 1909, fully and completely set forth in this transcript in substance and in form as accurately as it is possible to do the same, in compliance with the suggestion embodied by the defendants in their statement of defects and amendments to the Statement of Facts and Bill of Exceptions found in objection number 16 therein. These Exhibits are inserted at this place herein as supplemental to the copies of said Exhibits already contained herein in order that the paging and indexing may not unnecessarily be disturbed.

JOHN W. WALKER,
Official Court Reporter.

TERRITORY OF ARIZONA,
County of Cochise, ss:

I, John W. Walker, Official Court Reporter of the District Court of the Second Judicial District of the Territory of Arizona, in and for the county of Cochise to hereby certify that the above and foregoing three hundred and seventy-five pages (375) of typewritten matter constitute and contain a full, true and correct copy of all questions propounded to witnesses, and their answers thereto in the case wherein the Territory of Arizona, at the relation and to the use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona was plaintiff, and the Copper Queen Consolidated Mining Company, a corporation, was defendant, No. 1164, as well also as copies of all documentary evidence introduced in evidence, and also all remarks, rulings, opinions and judgments given and rendered during the trial thereof by the Judge presiding at the trial, and all objections and exceptions made and taken by counsel, and that they contain all the evidence given at the trial of said cause.

In witness whereof, I have hereunto set my hand in my official capacity as such Reporter, at Tombstone, in said county and territory, this 27th day of September, 1909.

JOHN W. WALKER,
Official Court Reporter.

It is agreed by counsel for the appellant that the foregoing Reporter's transcript (as amended) is correct.

W. G. GILMORE,
Tax Attorney.
PICKETT & BOWMAN, AND
E. S. CLARK, *Special Counsel.*

It is hereby agreed by counsel for the appellee that the foregoing Reporter's transcript (as amended) is correct.
Dated Oct. 21, 1909.

HERRING, SORIN & ELLINWOOD,
FREDERICK M. JUDSON,
Attorneys for Appellee.

575 I hereby certify that the foregoing Reporter's transcript (as amended) is correct, as agreed to and certified by counsel for the Appellant and Appellee respectively, and presented to me on the 25th day of October, 1909, and is by me on this 25th day of October 1909 approved.

FLETCHER M. DOAN,
Trial Judge.

Withdrawn by W. G. Gilmore, Tax Attorney, Pickett & Bowmmen, Special Counsel of the plaintiff for amendment October 14-'09.

GEO. B. WILCOX, *Clerk,*
By W. E. BOGGS, *Deputy.*

(Here follows Tax Bill, marked page 575*a;* Assessment Roll, marked 575*b;* Duplicate Assessment Roll, marked 575*c;* Delinquent Tax Roll, marked 575*d;* and Back-Tax Book, marked 575*e.*)

MAPS

TOO

LARGE

FOR

FILMING

576 And on to-wit: the eighth day of January, 1910, came the appellee by its attorneys, and filed in the clerk's office of said Court in said entitled cause, its certain Motion to Dismiss the Appeal, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona, January Term, 1910.

THE TERRITORY OF ARIZONA at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Motion to Dismiss.

Comes now Copper Queen Consolidated Mining Company, the appellee in the above entitled cause, by E. E. Ellinwood and Judson & Green, its attorneys of record, and moves the Court to dismiss the appeal in the above entitled cause, upon the grounds that the alleged assignments of error, and each thereof, made and filed in said cause, do not conform to the requirements of paragraph 1586 R. S. Ariz. 1901, as amended by Chapter 74, Laws of 1907; and Rule 7—assignments of error—of the Rules of this Court. That said alleged assignments of error are, and each thereof is, wholly insufficient to enable this Court to review the same, or any thereof, in this, that said alleged assignments of error, and each thereof, do not "distinctly specify each ground of error relied upon, and the particular ruling complained of"; nor do said alleged assign-
577 ments of error specify any specific ground of error relied upon, nor any particular ruling complained of, nor do the same "plainly state the errors complained of and refer to the page or pages of the record or of an abstract thereof."

Wherefore, the appellee prays that said appeal and all proceedings therein be dismissed.

E. E. ELLINWOOOD AND
JUDSON & GREEN,
Attorneys for Appellee, Copper Queen Consolidated Mining Company.

Reference is hereby made to the brief of appellee upon this motion, filed herewith.

And on to-wit: the tenth day of January, 1910, being one of the regular juridical days of the January Term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, on the call of the Calendar, it is ordered by the Court that this cause be passed until Thursday morning.

On motion of Mr. E. S. Clark, it is ordered that appellant be granted leave to file reply to Motion to Dismiss filed herein.

And on the same day to-wit: the tenth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

578

Title of Cause.

At this day, on motion of Mr. H. L. Pickett for appellant, it is ordered by the Court that one and one-half hours be granted for oral argument in this cause, and the hearing set for January 25th, 1910, subject to the Motion to Dismiss

And on the same day to-wit: the tenth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following other order was had and entered of record in said cause in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court that the Motion to Dismiss the Appeal filed herein by appellee, be submitted.

And on to-wit: the thirteenth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is ordered by the Court that the Motion to Dismiss the appeal, filed herein by appellee and heretofore submitted, be and the same is hereby, denied.

And on to-wit: the twenty fifth day of January, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

579

Title of Cause.

This cause coming on at this term for hearing was argued by Mr. H. L. Pickett and Mr. E. S. Clark for appellant, and Mr. E. E. Ellinwood for appellee, and cause ordered submitted.

And on to-wit: the twenty-sixth day of January, 1910, came the appellee by its attorneys, and filed in the clerk's office of said court in said entitled cause, a certain Decision, in words and figures following, to-wit:

In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

THE TERRITORY OF ARIZONA at the Relation and to the Use of E. S. WRIGHT, Tax Collector of the County of Yavapai, Plaintiff,

vs.

THE UNITED VERDE COPPER COMPANY, Defendant.

Decision.

This suit is brought under the law of 1903 for the purpose of collecting a balance due upon the taxes levied against the United Verde Copper Company for the year 1902. The defendant, by way of plea in abatement, set up that the taxes sued upon have never been listed, set out or contained in any back tax book as required by said statute and that hence the Court is without jurisdiction to entertain the action.

It was shown upon the trial that the back tax book for the year 1903 did not contain the delinquent taxes in question nor
580 have they been listed, set out or contained in any subsequent back tax book. The question, therefore, is clearly presented, whether the listing of delinquent taxes in a back tax book is essential to confer authority upon the Tax Collector to maintain an action to enforce the lien of the Territory against real estate under the law of 1903. This law was adopted from the statutes of Missouri which has been in force in that state since 1877. Under the accepted rule of construction our legislature adopted this statute with the construction which had been put upon it by the Supreme Court of Missouri prior thereto.

It must be admitted that under the general rules appertaining to the construction of revenue acts our statute strongly implies from its terms that the back tax book is an essential requisite for the maintenance of the suit by the Tax Collector to enforce the lien of the Territory, and that seems to have been the view of the Supreme Court of Missouri when they first had the matter before it.

In the case of State vs. Hamilton, reported in 7 S. W. 586, the opinion holds that the Tax Collector, under the law 1877, has no power or authority to maintain an action to enforce the collection of a delinquent tax unless he have in his possession the back tax book required by the statute. As said in the opinion "The back tax book was the warrant and authority under which the Collector alone could act." A foot note to this decision calls attention to the fact that the Supreme Court was evenly divided upon this question, the opinion, therefore, does not have the effect of a decision.

In the case of Railroad Company vs. Apperson, reported in 10

S. W. 480, it was held that a tax book, not authenticated by
581 the County Clerk and the seal of his office as required by statute, affords the Collector no authority to enforce the collection of a tax against the property of a railroad company.

The next case upon the subject is that of State vs. Scott, reported in 9 S. W. 22. This is one of the most singular cases reported in the books, in this, that the opinion seems to be directly at variance with the decision of the Court; the opinion seems to hold that a back tax book is the foundation of the action for back taxes brought by the Tax Collector and that without it he has no authority to maintain the action.

The last decision of the Supreme Court of Missouri prior to the adoption of the law of 1903 by our legislatutre which bears upon this subject is that of the State vs. Hurt, 20 S. W. 880. A majority of the court construed their former holding in State vs. Scott as applying wholly to the effect of the absence of the back tax book upon the back tax bill as evidence in the suit. They seem to hold in addition that a suit may be maintained by a Tax Collector under the law of 1877 to enforce the lien of the State for delinquent taxes against the real estate of the delinquent independent of any back tax book. As this holding was the last expression of the Supreme Court of Missouri construing our law prior to the adoption of the latter we are not concerned with subsequent holdings of that State. Whatever might otherwise be the construction of our statute upon this question, it seems to me that the case of State vs. Hurt, if not decisive of the question, yet is sufficiently strong in support of the construction contended for by the plaintiff in this case as to make it the duty of the trial court, in advance of any authoritative construction by our Supreme Court, to uphold jurisdiction in this and other similar cases rather than to deny it.

582 The plea in abatement will, therefore, be overruled.

The motion to strike from the complaint all allegations relating to items of personal property and the valuation thereof is well taken, in so far as its substance goes, but is defective on the technical ground that the motion does not specifically point out what particular allegations should be stricken from the complaint.

Under the law of 1903 no suit can be maintained to enforce a lien for taxes levied against personal property. The suit is one merely to foreclose the lien of the Territory for taxes levied on realty, and the judgment can only be one against specific tracts of land assessed for the taxes properly chargeable against such tracts. The statute has uniformly been so construed by the Missouri courts. This court has in a number of cases recently had occasion to so decide. Indeed, the language of the statute admits of no other possible construction. While, therefore, for the technical reason mentioned the motion to strike will be overruled, yet, no recovery can be had in this action for the unpaid balance of the taxes alleged to be delinquent upon the personal property of the defendant. I may say here that paragraph 3938 of the Revised Statutes providing for the collection of delinquent taxes levied on personal property by distress

and sale is still in force and is not repealed or otherwise affected by the law of 1903.

The first special demurrer raises a question of law which, though well taken, is, in the condition of the pleadings, more properly disposed of on the merits. The remaining demurrers are overruled.

Coming to the merits I hold that the compromise agree-
583 ment of July 21st, 1903, was without authority of law and did not, therefore, operate as a release of the unpaid balance of the taxes legally assessed against the defendant company for the year 1902. The amount paid therefore under this settlement must be credited as a payment pro tanto of the taxes legally due at the time.

As pointed out by the first special demurrer, the assessment is fatally defective as to certain items.

Our statutes are certain and clear as to the manner in which real estate shall be assessed. It must be described in such a way as that a sale made in a suit to foreclose the lien for taxes will be effective to pass a good title. Improvements on each tract, though separately assessed, must be described with particularity so that the tracts on which they appear may be definitely ascertained. Paragraphs 3849, 3861, 3862, 3863, 3864, Revised Statutes. See also French vs. Edwards, 13 Wall., 511; Bird vs. Benlisa, 142 U. S. 664.

In the assessment before us we find certain items, manifestly improvements on real estate and therefore presumptively realty, set down among items of personal property. These are described as "plant buildings," "bdg. and lodging houses," "company dwellings," "Masonic Hall," "hospital," and "New Hotel." No other description is given. Manifestly this attempted assessment violates in essential particulars our revenue act and is void; and, as no lien has attached no valid judgment can, under the law, be entered against the property thus inadequately described and assessed. The amount heretofore paid by the defendant company must therefore be cred-
ited upon the taxes assessed against the personal property
584 and the patented mines of the defendant company as these are sufficiently described. I find, therefore, that the plaintiff is entitled to judgment foreclosing the lien of the Territory for the amount of the unpaid taxes due and chargeable against the patented mines of the defendant company with interest and attorney's fees added thereto.

(Signed) RICHARD E. SLOAN, *Judge.*

TERRITORY OF ARIZONA,
County of Yavapai, ss:

I, J. M. Watts, Clerk of the District Court of the Fourth Judicial District of the Territory of Arizona, in and for the County of Yavapai, do hereby certify and [illegible] the foregoing to be a full, true and correct copy of the Decision of the Court in the case of the Territory Ex. rel. E. S. Wright Tax Collector of the County of Yavapai vs. The United Verde Copper Company, No. 4098, as the same appears on file and of record in my office, and I have carefully compared the same with the originals.

In witness whereof, I have hereunto set my hand and annexe
the seal of the said District Court at Prescott, this 9th day of Noven
ber, A. D. 1908.

(Signed) J. M. WATTS, *Clerk.*

[Seal of District Court, 4th Judicial Dist, Yavapai County.]

And on to-wit: the second day of April, 1910, there was filed i
the clerk's office of said Court in said entitled cause a certain Opin
ion in words and figures following, to-wit:

585 In the Supreme Court of the Territory of Arizona.

No. 1130.

THE TERRITORY OF ARIZONA, at the Relation and to the Use o
J. N. Gaines, Tax Collector in and for the County of Cochise, i
the Territory of Arizona, Plaintiff and Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corpora
tion, Defendant and Appellee.

Appeal from the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise—Hon. Fletcher M. Doan, Judge.

Statement of Facts.

This is a special statutory proceeding brought under Act No. 92 of the Laws of 1903 of the Territory of Arizona to enforce a lien for territorial and county taxes for the year 1901 upon the property described in the complaint, amounting, with interest and costs to the sum of $120,039.35 on the 8th day of June, 1904, together with interest thereon at the rate of ten per cent per annum until paid and the further sum of four per cent of the amount found due as the tax collector's fee and the further sum of twenty-five per cent upon the amount found due as the tax attorney's fee. The case was tried in the lower court without a jury. Judgment was entered in favor of the defendant and appellee that the plaintiff and appellant take nothing by its action and that the defendant and appellee recover its costs, from which judgment the appellant has prosecuted this ap-
peal. A motion for new trial made on the usual statutory
586 grounds was denied. Notice of appeal from the judgment
and order denying new trial was given and thereupon this appeal was perfected.

The facts disclosed by the evidence are substantially as follows: during the time provided by law for the assessment of property for territorial and county taxes in the year 1901, the appellee listed and returned to the assessor of Cochise County for assessment, certain patented claims belonging to the appellee, namely:

Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion,

Cumberland, Cave, (Dividend-Wedge-Ellis-Coon), East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Hollbrook, Howell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunrise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars & Stripes, South View, Tack, Union and Virginia. The tax list so returned appeared upon its face to be verified by the oath of the superintendent of the mining company, but was in fact not so verified.

The assessment as entered and shown upon the original assessment roll is as follows:

587

Name of taxpayer.	Lands and city and town property—Description of.	Number of acres.	Value of lands and town property.	Value of improvements.
Copper Queen Consolidated Mining Co.	—Bisbee—			
	65 Patented Mining Claims.			
	Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ella Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Hollbrook, Powell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sunrise, Space, Surprise, Silver Spray, Silver Bear, Sun Rise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia.....	636	3,180.00	55,431.00

A portion of the claims so included are in no sense contiguous.

At a meeting of the county board of equalization, on July 17th, 1901, the assessed valuation of the property of appellee was equalized by an increase on the mining claims named:

Silver Spray Mine	$1,000,000.00
Holbrook Mine	1,000,000.00
Hoist and improvements thereon	10,000.00
Copper Queen Mine	50,000.00
Copper Jack	50,000.00
Baxter Mine	250,000.00
Atlanta Mine	250,000.00
Dividend Mine	350,000.00
Rucker Mine	200,000.00
Making a total of	$3,160,000.00

In addition the personal property, machinery, merchandise, etc., was increased in the sum of $358,895.00 making a total raise of $3,464,895.00.

Thereafter the rate of taxation for county and territorial purposes was duly fixed and levied upon all of the taxable property in Cochise County at $3.20 upon each $100 of valuation. The tax so levied upon the property of the appellee as raised amounted to the sum of $122,657.09.

588 Upon this increase being made, the appellee filed an injunction suit in the district court of Cochise County, prior to September, 1901, to enjoin the collection of the tax upon the ground that said increase had been fraudulently made and that it was an overvaluation of its property. It therein tendered the full sum of $14,133.12, being the amount of the tax upon all of its property, real and personal, upon the assessment for said year prior to the increase made by the board of equalization. The district court granted an injunction against the collection of that portion of the tax here in controversy upon the payment of the sum tendered by the plaintiff of $14,133.12 and also the additional sum of $9,589.20 subsequently paid, which was the amount of the tax upon the increase made upon certain personal property herein, which increase the court found to be valid. The court in said suit found as one of its findings of fact that the increase of the board of equalization upon the mining claims was not based upon any information or evidence had or obtained by them, but was made arbitrarily and capriciously and for the purpose of imposing upon the plaintiff an unjust share of the burdent of taxation. The sum of $14,133.12 so paid by the plaintiff to the county for the tax levied upon the original assessment, which the appellee had admitted was due and tendered in its injunction suit, was accepted by the county treasurer and ex-officio tax collector "on account of any moneys which might ultimately be determined as due from said company for its tax for said year." An appeal was taken by the county from this decree to this Court. The opinion reversing the decree of the district court is reported under the name of County of Cochise v. Copper Queen Consolidated mining Company, 8 Ariz. 221; (opinion on rehear-

589 ing, 8 Ariz. 459.) This court there held that the only remedy against excessive taxation at that time, as the cause of action accrued before the Revised Statutes of 1901 became operative, was

that afforded under the jurisdiction of a court of equity but reversed the decree and remanded the case for new trial on the ground that the complaint was defective in not expressly averring that the property was assessed in excess of its full cash value.

Subsequent to the rendition of this decision an effort was made to compromise of the claim of the county and an agreement of compromise was made under resolution of the board of supervisors adopted July 7th, 1904, whereby the Copper Queen Company agreed to pay and did pay the further sum of $5,661.44 in full settlement of the taxes for the year 1901. Thereupon the injunction suit was dismissed by the appellee. This $5,661.44 so paid has been retained by the county.

Subsequently a proceeding in mandamus was instituted (Territory ex rel. Clark, Attorney General v. Gaines, Tax Collector, 93 Pac. 281) to compel the tax collector to commence suit against the Copper Queen Company for the collection of the balance of the tax remaining unpaid, upon the ground that the compromise so made was unauthorized and void. This court held that the board of supervisors had no authority to compromise said tax and granted the writ. This action was instituted pursuant to the mandate.

There is testimony offered tending to show that the raise made by the county board of equalization was not based upon any evidence of the value of the claims so raised and was in fact arbitrary. The appellee also offered evidence which was uncontradicted that certain of the mines which were thus raised were assessed far in
590 excess of their full cash value. Inasmuch as it has not been necessary to consider the question of the admissibility of this evidence under the defense interposed by the appellee, it is not necessary to further state the evidence bearing thereon.

W. G. Gilmore, Tax Attorney, (Pickett, Bowman & Pickett and E. S. Clark, Special Counsel) for Appellant.

E. E. Ellinwood and Judson & Green, for Appellee.

LEWIS, *J.* (after stating the facts):

The description of the sixty-five patented mining claims of the appellee, by name, as found upon the original assessment roll was sufficient. The statute then in force, (Par. 2652, R. S. 1887) provides:

"It shall be the duty of the assessor to prepare a tax list or assessment roll, * * * in which book or books he shall set down in separate columns: * * *

Second. All real estate taxable to each inhabitant, firm, incorporated company or association, described by metes and bounds, or by common designation or name, if situate within the limits of any city or any incorporated town, describing by lots, or fractions of lots; if without said limits, giving the number of acres as nearly as can conviently be ascertained, and the location and township where situate; all improvements upon public lands, describing as nearly as possible the location of such improvements; * * *

Sixth. The total value of all property taxable to each, * * * and the description of real estate shall be sufficient if the same can be readily identified thereby.

The name of a mining claim is a "common designation or name" within the meaning of the statute. By such name the real estate may be "readily identified." There can be no valid location of a mining claim without the selection of a name therefor. The name must be inserted in the location notice, is inserted in the patent, and the notice and patent made a matter of public record. The
591 practice of assessing patented mines by name has obtained too long in this territory to be now questioned. This mode of assessment is a practical construction of the statute of which we may take judicial notice and is of weight in the determination of the validity of an assessment so made.

Copper Queen Mining Co. v. Territory, 9 Ariz. 383.

The appellee was entitled to a separate assessment of its property in tracts or parcels unless it waived that right by the list it returned to the assessor. The appellant contends that the appellee is estopped by the return of the property described as a single tract or parcel of land from asserting illegality in the assessment here made en masse.

There is force in appellee's argument that there is no technical estoppel in pais pleaded or proven. Centennial etc. Co. v. Jauh County, Utah, 62 Pac. 1024. Yet the expression is frequently used in tax cases. Inland Lumber Co. v. Thompson, (Idaho) 83 Pac. 936 and cases therein cited. The Idaho court reaches the conclusion that in tax cases there should be a liberal application of the principle of estoppel in favor of upholding and enforcing an assessment against the taxpayer. Waiver is a definitive expression applicable to the action of appellee in making its list for taxing purposes. Returning its property en masse was a voluntary relinquishment of the known right of separate assessment. The taxpayer should not now be heard to complain. Kissimmee City v. Drought, 26 Fla. 1, 7 So. 525. Nor does the fact that the list returned was not verified by the oath of the superintendent of the mining company lessen its effect as such waiver. It is, nevertheless, a voluntary statement by the appellee of the manner in which its property might be properly assessed. State ex rel. Smith v. Cooper, Town Clerk, 59 Wis. 666, 18 N. W. 438.

592 The most important question raised upon the record is as to the validity of the action of the board of supervisors sitting as the board of equalization in raising the assessment upon eight of the group of sixty-five claims originally assessed en masse in amounts varying from $50,000.00 to $1,000,000.00 each.

The action of the board of equalization in making this raise is disclosed by the minutes following:

In the matter coming on this day regularly to be heard before the Board of Equalization pursuant to a notice heretofore served upon said company in writing, and which notice appears in the minutes of said Board, and in which said notice it was proposed to change and correct the valuation of said Company's property as the same appears upon said Assessment Roll, by adding thereto the sum of $3,464,895.00; for the reason that the sum fixed in said assessment roll appears to be too small; and this being the day and hour fixed in said notice for the hearing, and pursuant to a notice so given Walte

PLAINTIFF'S EXHIBIT "C." COPY OF DUPLICATE ASSESSMENT ROLL, 1901.

Duplicate Assessment Roll of Cochise C

NAME OF TAXPAYER.	REAL ESTATE AND PERSONAL PROPERTY. DESCRIPTION OF	No. of Acres	Value of Real Estate.	Im R
Copper Queen Con. Mining Co. 210	—Bisbee— 65 Patented Mining Claims. Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Hoilbrook, Powell, Harrison, Iron Monster, Little New York, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise Space, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampden, Wood Chopper, White Tail Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia	636	3,180.00	
	Improvements consist of Store building, Warehouse, Hospital Building, Office, and Doctor's Residence, and 3 houses, No. 48, 49 and No. 50, 1st Dist. 196 ft. frontage on south side of Main St. extending from Copper Jack mining claim west end line in westerly direction on which are located Dr.'s office and Library building		4,960.00	
	20 ft. on north side Main St. Store No. 6		200.00	
	106 ft. frontage on north side Main St. extending from Copper Jack claim west end line in a westerly direction fenced in as park and not occupied by any building except Fire Hose House		1,060.00	
	Sup't dwelling, etc., No. 112, 1st Dist		1,000.00	
	The Bessemer, No. 111, 1st Dist		300.00	
	Lot	26-1000	250.00	
	Part of Lot	78-1000	750.00	
	" " "	57-1000	500.00	
	Store at Naco			
	Furniture			
	Library			
	Piano			
	Merchandise, Naco			
	" Bisbee			
	Safe and Office Furniture			
	20 Work Horses			
	Wagons, etc.			
	Harness, etc.			
	Lumber and Lagging			
	Hoisting Works, etc.			
	Smelting Works			
	Mill, Mine and Smelter Supplies and Coal and Coke			
	Surveyors Inst. and Assaying Outfit			
	Cars and Car Track			

ate Assessment Roll of Cochise County, Arizona Territory, for the Year 1901

ATE AND PERSONAL PROPERTY. DESCRIPTION OF	No. of Acres	Value of Real Estate.	Value of Improvements on Real Estate.	Value of Personal Property.	CHANGES MADE BY COUNTY BOARD OF EQUALIZATION. Description of Property.	Amount	Total Valuation.	County Tax.	Territorial Tax.	Total Tax.
—Bisbee—					Raise—					
ented Mining Claims.					Silver Spray Mine	1,000,000.00				
of Spades, Amazon, Baxter,					Hoisting works on said mine	50,000.00				
Copper Queen, Copper Jack,					Hoolbrook Mine	1,000,000.00				
Copper Prince, Copper Bul-					Hoist & Imp	10,000.00				
land, Cave, Dividend, Wedge					Copper Queen Mine	50,000.00				
East Side, Frank Cogswell,					Copper Jack "	50,000.00				
den Gate, Goddard, Gardner,					Bldgs. & Imps	50,900.00				
ayes, Hoilbrook, Powell, Har-					Baxter Mine	250,000.00				
onster, Little New York, Look-					Atlanta "	250,000.00				
th, Malvina, New York, Nep-					Dividend "	350,000.00				
Star, Ophir, Rucker, Sun Rise					Rucker "	200,000.00				
ise, Silver Spray, Silver Bear,					Mdse, Store & W'h's	203,520.00				
Sacramento, Tip Top, Triangle,					Surveyors' Inst	375.00				
Wade Hampden, Wood Chop-					Assaying Outfit	600.00				
Tail Deer, Bisbee, Bell Isle,					Horses	400.00				
pper Monarch, Copper Crown,										
, Cuprite, Hardscrabble, Key-										
Jack, Raymond, Stars and										
th View, Tack, Union, Vir-	636	3,130.00	55431.00							
nts consist of Store building,										
Hospital Building, Office, and										
idence, and 3 houses, No. 48,										
50, 1st Dist. 196 ft. frontage										
e of Main St. extending from										
mining claim west end line										
direction on which are located										
nd Library building		4,960.00	7800.00							
north side Main St. Store		200.00	750.00							
ntage on north side Main St.										
om Copper Jack claim west										
westerly direction fenced in										
not occupied by any building										
Hose House		1,060.00						122,657.09		
ing, etc., No. 112, 1st Dist		1,000.00	2000.00					14,133.12	Paid on Account.	
ner, No. 111, 1st Dist		300.00	3000.00							
	26-1000	250.00					Dec. 9, '01	$108,523.97	Balance due.	
t	78-1000	750.00								
	57-1000	500.00	10000.00							
laco			2340.00							
				1,200.00						
				300.00						
				100.00						
e, Naco				13,875.00						
Bisbee				76,480.00						
ffice Furniture				1,500.00						
Horses				400.00						
tc.				610.00						
tc.				195.00						
d Lagging				11,568.00						
Works, etc.				44,641.00						
Works				112,451.00						
and Smelter Supplies and Coke				5,073.00						
Inst. and Assaying Outfit				225.00						
Car Track				6,000.00						
							3,833,034	77,810.59	44,846.50	122,657.09

Douglas, superintendent and agent of said Company appeared before the Board in behalf of said Company and made statements regarding said valuations and his arguments in reference thereto, and the Board being now fully advised in the premises, finds it necessary to add to the assessed valuation of the property of said Company on the assessment roll as follows, to-wit:

Silver Spray Mine	$1,000,000.00
Hoisting works and improvements on said mine	50,000.00
Holbrook Mine	1,000,000.00
Hoist and improvements thereon	10,000.00
Copper Queen Mine	50,000.00
Copper Jack Mine	50,000.00
On buildings and other improvements	50,000.00
On Baxter Mine	250,000.00
On Atlanta Mine	250,000.00
On Dividend Mine	350,000.00
On Rucker Mine	200,000.00
Stock of Mdse. in C. Q. store and warehouses	203,520.00
Surveying instruments	375.00
Horses	400.00
Assaying outfit	609.00
Or a total valuation of	3,464,895.00

593 & 594 Paragraph 2654 of the Revised Statutes of 1887 provides:

* * * The board of equalization shall have power to determine whether the assessed value of any property is too small or too great, and may change and correct any valuation, either by adding thereto or deducting therefrom, if the sum fixed in the assessment roll be too small or too great, whether said sum was fixed by the owner or the assessor; * * * and the clerk of the board of equalization shall note upon the assessment roll all changes made by the board. During the session of the board of equalization the assessor shall be present, and also any deputy whose testimony may be required by the parties appealing to the board, and they shall have the right to make any statement touching such assessment, and producing evidence relating to questions before the board, and the board of equalization shall make use of all other information that they can gain otherwise, in equalizing the assessment roll of the county, and may require the assessor to enter upon such assessment roll any other property, which has not been assessed; and the assessment and equalization so made shall have the same force and effect as if made by the assessor before the delivery of the assessment roll to (by) him by (to) the clerk of the board of equalization. * * *

The raise here made was never entered upon the original assessment roll. This was a mere omission and harmless. Wallapai Mining Co. v. Territory, 9 Ariz. 373.

The raise was first carried into the tax books by an entry upon the duplicate assessment roll as follows:

(Here follows Duplicate Assessment Roll marked 593*a*.)

595 Disregarding for the present, a variation in the names of the sixty-five claims, the delinquent tax roll, the back tax book and the back tax bill substantially conform to the duplicate assessment roll, except as to certain entries of payments, penalties and interest.

It is apparent from an examination of this roll, that there are in effect two assessments for the same year against each of the eight claims raised. One, an assessment commingled with that of sixty-four other claims en bloc; the other separate and distinct. This is no mere irregularity. The legality of the original assessment as an entirety, has been sustained solely upon the ground that the property was so returned by the tax payer. The board disregarded such return and the validity of its action must be determined under the statute alone. It might be argued successfully that had the board of supervisors raised the assessment upon the group, such a raise would have been valid. But the board segregated from the group certain claims and imposed thereon an additional assessment. It is a fundamental rule of taxation in this territory, that a taxpayer may pay upon any one of parcels separately assessed, discharging the lien thereon, without paying upon the remainder. Par. 2676, Revised Statutes of 1887.

Judge Cooley says:

"When two parcels are owned by the same person, if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceedings. It cannot be held in any case that it is unimportant to the taxpayer whether this requirement is complied with or not. Indeed it is made solely for his benefit; it being wholly immaterial, so far as the interest of the state is concerned, whether separate estates are or are not separately assessed. And where a requirement has for its sole object the benefit of the taxpayer, the necessity for a compliance with it cannot be
596 made to depend upon the circumstances of a particular case, and the opinion of a court or jury regarding the importance of obedience to it in that instance. That method of construing statutes would abolish all certainty." Cooley on Taxation, page 735.

By the action of which complaint is made here, the board deprived the appellee of this right. Upon the raise being made it had the legal right to determine upon which, if any, of the claims so raised, it would pay. If it determined to pay upon none, it was, nevertheless, obliged to pay a portion of the tax thereon if it exercised its right to pay upon the fifty-seven claims remaining, for the tax collector, under Paragraph 2676, supra, (re-enacted, Paragraph 3900, Revised Statutes 1901) could not receive the tax upon less than the entire sixty-five claims, that being the least subdivision appearing on the assessment roll. If it determined to pay upon one or more of the eight so raised and to abandon the remainder, it would have to pay the tax upon the raise together with the tax upon the entire sixty-five claims as originally assessed.

The undisputed testimony discloses that these claims were non-contiguous in instances which would have invalidated an original

assessment, except for the return. The board in raising this assessment disregarded the original classification, which has been held good as against the appellee solely by reason of its return.

The board of supervisors sitting as a board of equalization, had no power under Paragraph 2654 of the Revised Statutes of 1887 to segregate from a tract of land returned and assessed as one parcel, a portion thereof and impose thereon an additional assessment, without first determining that such tract was improperly assessed as a whole and causing such tract to be reassessed and raised in sub-
597 divisions in such manner as to preserve the right of the taxpayer to discharge the lien of taxes upon such of the several separate tracts as he might elect.

The question here determined was neither presented nor considered in the case of County of Cochise vs. Copper Queen Company, 8 Ariz. 211.

Upon the trial of the case, the court received all evidence offered subject to the various objections made thereto. To the offers by the plaintiff of the assessment roll, the duplicate assessment roll, the delinquent assessment roll and the back tax book, the defendant objected upon the ground of a variance from the allegations of the complaint.

The list of mining claims set forth in paragraph IV of the complaint is as follows:—"Sixty-five (65) patented mining claims near Bisbee, Arizona, as follows: Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle, Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia." Said mining claims consisting of 636 acres.

Thus naming sixty-five claims.

It differs from the list shown in the Assessment Roll in this: It names the "Dividend Wedge," the "Howell," the "Belle" and
598 the "Isle," which are omitted from the assessment roll; and it omits the "Dividend," the "Wedge," the "Powell," the "Little Joker," the "Sunrise" and the "Belle Isle," all of which are included in the assessment roll; it names only sixty five claims, whereas the assessment roll names sixty-seven.

Disregarding the discrepancy in the naming of the Dividend Wedge and the Belle Isle as a mere matter of punctuation and the writing of Sun Rise as a compound name, the error in the names "Howell" and "Powell" and the mention of the Little Joker claim in the assessment list is a material variance which would render the

assessment list inadmissible in proof of the allegations of the complaint.

Again the complaint differs from the list shown in the Duplicate Assessment Roll in this:—It names the "Howell," the "Dividend Wedge," the "Belle" and the "Isle," all of which are omitted from the duplicate assessment roll; and it omits the "Powell," the "Dividend," the "Wedge" and the "Belle Isle," all of which are included in the duplicate assessment roll.

The variance disclosed renders the roll inadmissible under the complaint.

Again it differs from the list contained in the Delinquent Roll in this:—it names the "Dividend Wedge," the "Howell," and the "Silver Bear," all of which are omitted from the delinquent roll; and it omits the "Dividend," the "Wedge" and the "Powell," all of which are included in the Delinquent Roll.

The delinquent roll is therefore inadmissible.

And finally the back tax book is inadmissible under the objection made, for the complaint differs from the list in the Back Tax Book in this: It names the "Dividend Wedge," the "Howell," the
599 "Silver Bear," the "Belle" and the "Isle," all of which are omitted from the back Tax Book; and it omits the "Dividend," the "Wedge," the "Powell" and the "Belle Isle," all of which are included in the back tax book.

The importance of the objections here considered is rendered more apparent by a consideration of the nature of the action. It is an action quasi in rem to fix a lien upon specific property. No personal judgment can be had.

The statutes, section 88, act 92, Laws of 1903, provides:

"The judgment, if against the defendant shall describe the land upon which the taxes are found to be due, shall state the amount of taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the territory be enforced and that the real estate or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said land."

This statute was adopted from Missouri, and the prior construction thereof by the courts of last resort of the State of Missouri is, under well established principles, controlling upon us. A judgment is an action to collect back taxes, differing from the complaint in the description of the property sought to be subjected to the lien of such tax is void. Milner v. Shipley (Mo. 1888), 7 S. W. 175, Vaughan v. Daniels (Mo. 1899), 11 S. W. 573, O'Day v. McDaniel, (Mo. 1904, subsequent to the passage of act No. 92), 80 S. W. 895.

Now is the admission of this evidence rendered harmless by the proof that an amount equivalent to the tax upon the property as originally assessed was tendered by the appellee in full payment of its tax for the purpose of bringing a suit in equity to enjoin the collection of the tax upon the various raises and subsequently paid

to the county in the course of suit, and credited by it upon
600 the entire tax claimed to be due. Assuming that it was paid and accepted as a discharge of the original tax, as appellant now contends was the fact, the amount now in suit is the tax upon the raise. Without a valid original assessment there could be no raise. The fact of payment of the original tax does not dispense with the necessity of proof of an assessment admissible under the facts alleged in the complaint.

The defendant also objected upon the ground of variance to proof of the action of the board of equalization as disclosed by the minutes of its meetings. Upon the introduction of the various exhibits showing the separate raises of each of the eight claims therein mentioned, the defendant renewed this objection.

To determine whether or not the variance is material, the allegations of the complaint must be examined. Paragraph four of the complaint contains the only description of the property sought to be subjected to the tax lien. So far as essentiaal the allegation is "Sixty-five (65) patented mining claims near Bisbee, Arizona, (then follows the list by name as hereinabove set forth), said mining claims consisting of 636 acres assessed at $3,180.00. In paragraph six appears the allgeation as to the raise, namely: "To the valuation of the patented mines and improvements $3,260,000.00." In paragraph fourteen the pleader alleges the amount due "all of which is a lien upon the lands and real estate owned by and assessed against said Copper Queen Consolidated Mining Company for the year 1901 as hereinabove set forth."

No where is there a reference to the specific raise upon the eight claims against which the lien is now asserted, nor is there a further description thereof. The prayer of the complaint was originally for a foreclosure of the alleged lien against the tract of sixty-five (65) claims as an entirety. By leave of the Court, subse-
601 quent to the admission of the evidence under consideration, the prayer was amended to read, "That the said judgment and whole thereof be adjudged and decreed to be the first and paramount lien upon such of the aforesaid described lots, tracts and parcels of land and real estate as the Court may, from the proof, adjudge to be subject to a lien for said taxes in favor of the Territory of Arizona." There was, however, no amendment of the allegations of facts upon which relief was sought. The complaint therefore alleges a raise of the sixty-five claims en bloc. The proof of raise upon eight of the sixty-five claims, upon which alone it is now sought to foreclose the lien is a substantial variance.

The trial court did not err in rendering and entering judgment for the defendant. The judgment therefore, is affirmed.

ERNEST W. LEWIS,
Associate Justice.

We concur.

EDWARD KENT, *C. J.*
JOHN H. CAMPBELL, *A. J.*
EDWARD M. DOE, *A. J.*

And on the same day to-wit: the second day of April, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order and Judgment, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

602 No. 1130.

THE TERRITORY OF ARIZONA, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizonaa, Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Appellee.

This cause having been heretofore submitted and by the Court taken under advisement, and the Court having considered the same and being fully advised in the premises:

It is ordered that the judgment of the District Court be, and the same is hereby, affirmed.

It is further ordered, adjudged and decreed that the appellee herein, do have and recover of and from the appellant herein, its costs in this court taxed at — together with its costs in the court below in this cause incurred, taxed at fifty-nine and 15/100 ($59.15) Dollars.

And on to-wit: the eighteenth day of April, 1910, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause its certain Motion for Rehearing in words and figures following, to-wit:

603 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Motion for Rehearing.

Comes now the appellant above named, by its attorneys, and moves the Court to grant a re-hearing of this case upon its merits, for the following reasons, to-wit:

1. That the point upon which the Court's decision in this case was based, was raised by the Court itself, after the case had been submitted, and was not raised by appellee during the trial of the case nor in its briefs or arguments before this Court, and therefore appellant is entitled to be heard thereon.

2. The Court has decided that the original assessment of this property en masse was a valid assessment, owing to the fact that it was so

returned by the owner. It has held, however, that the attempted raise by the Board of Equalization of certain claims included
604 in the original assessment was invalid, in that there were in effect two assessments for these particular claims for that year, and that the Board had no right to segregate particular portions and re-assess them, without re-assessing the whole. The error of the Court in this respect we think is due to its failure to effectuate the obvious intention of the Board, which was to assess this whole property in an amount appropriate to its actual value, whether it be regarded as a raise of eight claims only or as a raise of the whole group. Such being the intention of the Board, and inasmuch as the law favors the payment of just and equitable taxes, it naturally follows that if ineffectual as a raise on particular claims, the assessment operated as a raise upon the whole group, and the same became impressed, or instante, with the obligation to pay the tax.

3. Having determined that the company had, by its return, voluntarily relinquished its right of separate assessment, the Court should also have found as a necessary sequence thereto, that the company had thereby relinquished its right to claim the privilege of paying the tax upon any portion less than the whole, and of discharging the lien upon that portion without paying upon the remainder. As the taxpayer has relinquished of his own accord his privilege of separate assessment, he has as a matter of course relinquished also the right of paying upon any part less than the whole, for the exercise of that right depends upon the manner in which the original assessment has been made; otherwise, it would be futile to say that the original assessment en solido was valid, when by claiming his right of segregation he could later avoid the payment of any taxes, on the ground that he had been deprived of that right. To
605 allow this, would be to permit him to take advantage of his own wrong.

It follows then that it was not the raising of the valuation of certain particular mines which deprived him of his right of segregation, but it was due to the voluntary act of the taxpayer in returning his property en masse. It follows, also, that the legality of the raise cannot thereafter be questioned on that particular ground.

While the decision of the Court compels us to take different ground respecting the effect of the raise than we have heretofore held, we are convinced by the Court's reasoning that the Board could not lawfully segregate these eight claims from the mass and raise the valuation of them separately, there having been no separate assessment. But we most respectfully differ essentially from the conclusion of the Court that this action was void. On the contrary, we insist that the action of the Board was in legal effect, a raise of the whole group as originally returned. If it be true that there could be no segregation, either for the purpose of permitting the payment of taxes upon a particular tract less than the whole, or of raising the valuation for taxable purposes on anything less than the whole, then it follows that a raise of any part of the original group is in effect a raise of the whole. For it must be apparent that the value of the whole tract is equal to the value of all its parts, so that when the value of part

was raised, the amount so added merely increased the aggregate value of the whole tract.

The Court concedes that the Board had the right to raise the value of the whole tract. If the acts of the Board have this effect, then the raise is valid and the Court should give it effect. The taxpayer
606 is not injured by the irregularity. Its position is precisely the same as though the Board had expressly added to the value of the whole tract. It would have to pay exactly the same amount of taxes in either case to discharge the tax lien, and payment under the present status of the record will free its property just as effectually as though it had paid the same sum under a raise of the whole tract.

The Court will bear in mind that there is no testimony in the record that the raised valuation exceeded the cash valuation of the whole tract, and even the evidence that was admitted on the question of valuation was flagrantly inadmissible, for the reasons stated in our reply brief.

This effectually disposes of the theory of the Court that "there are in effect two assessments for the same year against each of the eight claims raised; one, an assessment commingled with that of sixty-four other claims en bloc; the other separate and distinct". There was but one assessment of the whole tract, and in legal effect one raise of the whole tract. This also harmonizes the action of the Board with the original return made by the taxpayer, and disposes of the theory of this Court that the Board "disregarded the original classification". If the Board could not raise segregated portions of the whole, then of course it did not. If the act of the Board operated to raise the value of the whole, then it is the duty of this Court to give such acts effect, especially as such course leaves the taxpayer in the same situation as though the raise had in terms been applied to the whole tract.

This situation also harmonizes the variances between the complaint and the assessment rolls, etc., and renders the differences immaterial. For if the several mines listed are to be treated as
607 one tract for the purpose of assessment, as they must be under the holding of this Court, then if there be sufficient description to identify the tract, there is complete harmony between all the lists. It of course will not and cannot be suggested that there is any doubt raised by the variances as to the identity of the tract. Indeed, the description of the property as a tract is ample under Paragraph 2652, Revised Statutes 1887, Subdivision Six, which reads in part as follows:

"And the description of real estate shall be sufficient if the same can be readily identified thereby."

If the taxpayer pays on the claims described in the complaint, he pays on so many of them as are also named in its return and upon the assessment rolls, and thereby discharges the lien on all. If claims are mentioned in the complaint which are not named in the list returned or the assessment rolls, the taxpayer is not hurt, as he only pays the taxes upon the claims actually owned and returned. No additional tax is imposed by reason of the claims erroneously added in the complaint, and in any event the taxpayer is fully protected as to all the claims in the tract when he satisfies the judgment, as the

judgment must be against the whole tract. In case the taxpayer suffers a sale under execution, it is not injured because some claims belonging to and returned by it are omitted from the sale, neither is it injured if some of the claims not returned by it are not included in the sale, as it loses nothing and the purchaser takes nothing thereby. But viewed in any light, the complaint correctly describes enough claims to identify the tract, and that is sufficient, especially in view of the numerous admissions in the record by appellee that the
608 tract described in the complaint is one with the tract returned and assessed.

This brings us to a consideration—now hardly necessary—of the holding of the Court set forth on page 12 of the opinion:

"By the action of which complaint is made here" (the raise upon the eight claims) "the Board deprived the appellee of this right" (the right to pay on any one of parcels separately assessed, discharging the lien thereon, without paying on the remainder). "Upon the raise being made, it had the legal right to determine upon which, if any, of the claims so raised it would pay. If it determined to pay upon none, it was, nevertheless, obliged to pay a portion of the tax thereon if it exercised its right to pay upon the 57 claims remaining, for the tax collector, under Par. 2676, supra (re-enacted Par. 3900, R. S. 1901) could not receive the tax upon less than the entire 65 claims, that being the least subdivision appearing upon the assessment roll. If it determined to pay upon one or more of the eight so raised and abandon the remainder, it would have to pay the tax upon the raise, together with the tax upon the entire sixty-five claims as originally assessed."

The "tax upon the entire sixty-five claims as originally assessed", valued at $3,180 in the aggregate, amounts to $101.70, or an average of $1.56 per claim. Under the first proposition stated by the Court it would lose eight times $1.56, or $12.48. In the latter case it might lose either $1.56 or $10.92, dependent upon how many of the eight claims might be abandoned.

While we admit that the payment of any of these sums in real money—as taxes—would be a great hardship to the appellee, the ordinary taxpayer would be quite willing that the Court should disregard both propositions on the ground of de minimis.

Finally, if the raise made by the Board is treated by the Court—as rightly it ought to be—as a raise upon the whole group, then the Missouri cases cited by the Court on page 15 of its opinion have absolutely no application. If the assessment was on separate par-
609 cels, and the parcels were fatally misdescribed so that they could not be identified, the Missouri cases might apply. Here, however, the taxpayer owned a tract comprising sixty-five claims, which it returned and which were assessed en masse. The only question is as to the identity of the tract, and as there is and can be but one, and as admittedly the tract described in the complaint is the same tract returned, there is no variance.

Under the views above expressed, the judgment of the trial Court must depend wholly upon the narrowest of technicalities. We cannot believe that in a matter of such great importance to the people

of the Territory, this Court will permit a judgment so lacking in foundation to stand.

Naked of any suggestion of equity, unmindful of every obligation of decent citizenship, sneering at the poverty-ridden who must bear its share of taxes if this judgment be affirmed, the appellee asks this honorable Court to say, in effect, that because appellee has the lack of conscience and the excess of wealth to permit it to invoke technicalities which are too attenuated as well as too expensive to be available to the ordinary citizen, it should be encouraged in the gentle art of tax-dodging.

Respectfully submitted,

E. S. CLARK,
Attorney for Appellant.

610 And on to-wit: the twentieth day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day, it is ordered by the Court, that the Motion for Rehearing, filed herein by appellant, be submitted.

And on to-wit: the twenty-first day of May, 1910, being one of the regular juridical days of the January term of said court, 1910, the following order, inter alia, was had and entered of record in said cause, in words and figures following, to-wit:

Title of Cause.

At this day it is order by the Court that the Motion for Re-hearing filed herein by appellant and heretofore submitted, be, and the same is hereby, denied.

611 And on to-wit: the twenty-second day of March, 1911, being one of the regular juridical days of the January term of said court, 1911, the following order, inter alia, was had and entered of record in said cause, in words and figures following—to-wit:

Title of Cause.

At this day comes E. S. Clark, Esq., for appellant herein, in open court, and given notice of appeal to the Supreme Court of the United States from the judgment of this Court.

And on the same day to-wit: the twenty-second day of March, 1911, came the appellant by its attorneys and filed in the clerk's office of said Court in said entitled cause, its certain Application for, and Allowance of, Appeal, in words and figures following, to-wit:

12 In the Supreme Court of the Territory of Arizona.

No. —.

THE TERRITORY OF ARIZONA, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Application for Order Granting Appeal.

The above named appellant, conceiving itself aggrieved by the judgment entered herein on the 2d day of April, 1910, in the above entitled cause, hereby appeals from said judgment to the Supreme Court of the United States, and prays that this appeal may be allowed, that citation issue, and that a transcript of the records and proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

W. G. GILMORE,
E. S. CLARK,
Attorneys for Appellant.

The Appeal hereinabove prayed for is hereby allowed upon the filing with the Clerk of this Court by the Appellant above named The Territory of Arizona, of a bond for costs in favor of the above named Appellee, the Copper Queen Consolidated Mining Company, in the sum of One Thousand Dollars, and that Citation issue upon the filing and approving of said bond.

Dated this 23 day of March, A. D. 1911.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

613 And on the same day to-wit: the twenty-second day of March, 1911, came the appellant by its attorneys and filed in the clerk's office of said Court in said entitled cause, its certain Affidavit of Value, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. —.

THE TERRITORY OF ARIZONA, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Affidavit of Value.

E. S. Clark, of lawful age, first being duly sworn, on his oath says: That he is one of the Attorneys for the appellant in the above entitled cause, and is conversant with the facts relating thereto; and that the matter in dispute in said cause, exclusive of all costs, exceeds the sum of five thousand dollars.

E. S. CLARK.

Subscribed and sworn to before me this 22d day of March, A. D. 1911.

[SEAL.] F. A. TRITLE, JR.,
Clerk Supreme Court.

614 And on to-wit: the twenty-third day of March, 1911, came the appellant by its attorneys and filed in the clerk's office of said Court in said entitled cause, its certain Notice of Appeal, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. —.

THE TERRITORY OF ARIZONA, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Notice of Appeal.

To the Copper Queen Consolidated Mining Company, appellee in the above entitled cause, and its Attorneys, E. E. Ellinwood, Esq., and Messrs. Judson and Green:

Please take notice that the Plaintiff and Appellant in the above entitled action hereby appeals to the Supreme Court of the United States, from that certain judgment in favor of said Defendant and

Appellee and against said Plaintiff and Appellant, rendered by the above entitled Court on the 2d day of April, 1910, and from the whole thereof.

Dated this 22d day of March, A. D. 1911.

W. G. GILMORE,
E. S. CLARK,
Attorneys for Plaintiff and Appellant.

615 And on the same day to-wit: the twenty-third day of March, 1911, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause, its certain Assignment of Errors, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

No. 1130.

THE TERRITORY OF ARIZONA, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Assignment of Errors.

Comes now the Territory of Arizona, the appellant above named, and assigns the following as error committed by the Supreme Court of Arizona in the above entitled action, to-wit:

I.

The Court erred in holding that there was such a variance between the Complaint filed in the Court below (as to the names of the sixty-five patented mining claims) and the assessment list, assessment rolls, delinquent list, and back tax book, as rendered said assessment rolls and lists inadmissible in evidence.

II.

The Court erred in holding and adjudging that proof of a raise in valuation by the Board of Equalization of Cochise County of eight of the sixty-five claims assessed en block did not constitute evidence of a raise in the value of the entire tract, and that such proof therefore constituted a material variance.

616 III.

The Court erred in holding that payment of the tax upon the valuations fixed in the original assessment would not render harmless the misdescriptions, errors and omissions occurring in transcribing the names of said sixty-five patented mining claims from list to book, as shown by the record herein, for the reason that the payment

of said original tax is a binding admission on the part of the Company that the original assessment was valid.

IV.

The Court erred in affirming the judgment of the trial court in said action and in refusing to enter judgment for the Territory as prayed in its Complaint.

W. G. GILMORE,
E. S. CLARK,
Attorneys for Appellant.

And on to-wit: the first day of April, 1911, came the appellant by its attorneys and filed in the clerk's office of said court in said entitled cause, its certain Bond on Appeal, in words and figures following, to-wit:

617 In the Supreme Court of the Territory of Arizona.

No. —.

THE TERRITORY OF ARIZONA at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Bond on Appeal.

Know all men by these presents: That we, the Territory of Arizona, as principal, and C. L. Cummings and F. N. Walcott, as sureties, are held and firmly bound unto The Copper Queen Consolidated Mining Company, a corporation, respondent herein, in the sum of One Thousand Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of March, 1911.

The condition of the above obligation is such that,

Whereas, the said appellant, the Territory of Arizona, has been granted an appeal to the Supreme Court of the United States from the judgment of the Supreme Court of the Territory of Arizona, rendered in the above entitled cause by said Court on the 2d day of April, 1910.

Now, therefore, if the above named principal and Appellant shall prosecute its said appeal with effect, and answer all damages and costs if it shall fail to make good its said appeal, then this ob-
618 ligation shall be void, otherwise to remain in full force and virtue.

THE TERRITORY OF ARIZONA,
By J. N. GAINES, *Relator.*
C. L. CUMMINGS.
F. N. WOLCOTT.

TERRITORY OF ARIZONA,
County of Cochise, ss:

C. L. Cummings and F. N. Walcott whose names are subscribed as sureties to the within Bond, being severally duly sworn, each for himself, deposes and says: That he is a resident and freeholder within the Territory of Arizona; that he is worth the sum of One Thousand Dollars, over and above all his just debts and liabilities, and over and above all property exempt from execution and forced sale.

C. L. CUMMINGS.
F. N. WOLCOTT.

Subscribed and sworn to before me this 27th day of March A. D. 1911.

[SEAL.] J. T. KINGSBURY,
Notary Public.

My commission expires May 19th, 1913.

Approved:
EDWARD KENT,
Chief Justice.

619 And on to-wit: the twentieth day of May, 1911, there was filed in the clerk's office of said court in said entitled cause a certain Statement of Facts, in words and figures following, to-wit:

In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Statement of Facts on Appeal to the Supreme Court of the United States.

An appeal herein to the Supreme Court of the United States having been allowed on the 22nd day of March, 1911, the Supreme Court of Arizona makes and orders filed this, its statement of facts in the nature of a special verdict on such appeal:

This is a special statutory proceeding brought under Act No. 92 of the laws of 1903 of the Territory of Arizona, which was adopted from the Statute of the State of Missouri to enforce a lien for territorial and county taxes for the year 1901 on the property described in the complaint, said taxes amounting with interest and costs to the sum of $120,039.35 on the 8th day of June, 1904, together with interest thereon since that date, at the rate of 10% per annum, and the further sum of 4% of the amount found due as the tax collector's fee and the further sum of 25% of the amount found due as the tax attorney's fee. The case was tried in the lower court without a jury.

620 Judgment was entered in favor of the defendant, appellee, to the effect that the plaintiff, appellant, take nothing by its action; from which judgment the appellant appealed to this court. This court, on appeal, affirmed the judgment of the lower court. The facts as found by the Court are as follows:

The appellee, the Copper Queen Consolidated Mining Company, is a corporation doing business and owning real and personal property in Cochise County, Arizona. During the time provided by law for the assessment of property for territorial and county purposes, in the year 1901, it listed and returned to the Assessor of Cochise County for assessment certain patented mining claims belonging to it, being sixty-five in number and listed as follows: Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave (Dividend-Wedge-Ellie-Coon), East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunrise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail, Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars & Stripes, South View, Tack, Union, and Virginia.

The tax list so returned appeared upon its face to be verified by the oath of the superintendent of the mining company, but, in fact, was not so verified. Said list, as returned, included among other property the aforesaid sixty-five patented mining claims
621 & 622 as one tract, which tract was stated therein to comprise 636 acres and was valued at $3,180.00, and the improvements thereon valued at $55,431.76. Other real and personal property was returned in said list, and all said property, including said patented mines, was listed at a total valuation of $368,139.76. A portion of the patented claims included in said list are not contiguous to any of the others.

The assessment as entered and shown upon the original assessment roll is as follows:

(Here follows Assessment Roll, marked page 621*a*.)

(671a)

PLAINTIFF'S EXHIBIT "B."

ASSESSMENT ROLL OF COCHISE COUNTY, ARIZONA TERRITORY, FOR THE YEAR 1901.

NAME OF TAXPAYER.	LANDS AND CITY AND TOWN PROPERTY		Value of Lands and Town Property	Value of Improvements.	DESCRIPTION OF PERSONAL PROPERTY.	Value of Personal Property	Total Valuation.
	DESCRIPTION OF	Number of Acres.					
Copper Queen Consolidated Mining Co.	—Bisbee—				H. H. Furniture	$1,200.00	$448,915.00
	65 Patented Mining Claims.				Library	300.00	
	Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend, Wedge, Ella Coon, East Side Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Hollbrook, Powell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammoth, Malvina, New York Neptune, North Star, Ophir, Rucker, Sunrise, Space, Surprise, Silver Spray, Silver Bear, Sun Rise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia	636	3,180.00	55,431.00	Piano	100.00	
					Merchandise, Naco	13,875.00	
					" Bisbee	76,480.00	
					Safe and office Furn.	1,500.00	
					20 W. Horses @ $20.00	400.00	
					Wagons, etc.	610.00	
					Harness, etc.	195.00	
					Lumber and Lagging	11,568.00	
					Hoisting Works, etc.	44,641.00	
					Smelting Works	112,451.00	
					Mill and Mine and Smelter Supplies and Coke and Coal	5,073.00	
					Surveyors' Instruments	125.00	
					Assaying Outfit	100.00	
					Cars and Car Track	6,000.00	
							368,139.00
							285,375.00
							553,514.00
	Improvements consist of store building, Warehouses, Hospital Buildings, Office and Doctor's Residence, and 3 houses No. 48 and 49 and 50, 1st. Dis. 196 ft. frontage south side of Main St., extending from Copper Jack Mining Claim west end line in westerly direction, on which are located						
	Doctor's office and Library Building		4,960.00	7,800.00			
	20 ft. on north side of Main St., Store No. 6		200.00	750.00			
	106 ft. frontage on north side of Main St. extending from Copper Jack Claim, west end line in a westerly direction, fenced in as Park and not occupied by any building except "Fire Hose House"		1,060.00				
	Supt. Dwelling, etc., No. 112, 1st. Dist.		1,000.00	2,000.00			
	"The Bessemer," No. 111, 1st. Dist.		300.00	3,000.00			
	Lot	26-1000	250.00				
	Part of Lot	78-1000	750.00				
	" " "	57-1000	500.00	10,000.00			
	Store at Naco			2,340.00			

I, H. E. BERNER, Clerk of the Board of Supervisors of Cochise County, Territory of Arizona, do hereby certify that the above and foregoing is a true and correct copy of the assessment of the Copper Queen Consolidated Mining Company for the year 1901, as placed on the Original Roll of said year by the Assessor—pages 55 and 56.

H. E. BERNER,
Clerk Board of Supervisors, Cochise County, Arizona.

May 5, 1908.
(Seal Board of Supervisors)

623 At a meeting of the County Board of Supervisors sitting as the Board of Equalization for Cochise County, held on July 17th, 1901, the said Board of Equalization raised the assessment upon eight of the group of sixty-five claims originally assessed en masse, in amounts varying from $50,000 to $1,000,000.00 each. The action of the Board of Equalization in making this raise is disclosed by the minutes following:

"In the matter of the equalization of the assessment of the properties belonging to the Copper Queen Consolidated Mining Company:

This matter coming on this day regularly to be heard before the Board of Equalization pursuant to a notice heretofore served upon said company in writing, and which notice appears in the minutes of said Board, and in which said notice it was proposed to change and correct the valuation of said Company's property as the same appears upon said Assessment Roll, by adding thereto the sum of $3,464,895.00; for the reason that the sum fixed in said assessment roll appears to be too small; and this being the day and hour fixed in said notice for the hearing, and pursuant to a notice so given Walter Douglas, Superintendent and Agent of said Co. appeared before the Board in behalf of said Co. and made statements regarding said valuations, and his arguments in reference thereto, and the Board being now fully advised in the premises, finds it necessary to add to the assessed valuation of the property of said Co. on the assessment roll as follows, to-wit:

624	Silver Spray Mine	$1,000,000.00
	Hoisting Works and improvements on said mine	50,000.00
	Holbrook Mine	1,000,000.00
	Hoist and improvements thereon	10,000.00
	Copper Queen Mine	50,000.00
	Copper Jack Mine	50,000.00
	On Buildings, and other improvements	50,000.00
	On Baxter Mine	250,000.00
	On Atlanta Mine	250,000.00
	On Dividend Mine	350,000.00
	On Rucker Mine	200,000.00
	Stock of Mdse. in C. Q. Store and warehouses	203,520.00
	Surveying instruments	375.00
	Assaying outfit	600.00
	Horses	400.00
	Or a total valuation of	$3,464,895.00"

Thereafter the rate of taxation for county and territorial purposes was fixed and levied upon all the taxable property in Cochise County at $3.20 per $100.00 of valuation.

The tax so assessed upon the property of the appellee as raised, amounted to the sum of $122,657.09. Whereupon, the appellee filed

an injunction suit in the District Court of Cochise County, prior to September, 1901, to enjoin the collection of the tax, upon the ground that the said increase therein had been fraudulently made, and that it was an over valuation of its property. It tendered, in said suit, the full sum of $14,133.12, being the amount of the tax upon all of its property, real and personal, as assessed for said year, prior
625 to the said increase thereof by the Board of Equalization. The District Court granted an injunction against the collection of that portion of the tax in controversy here upon condition of the payment of the sum of $14,133.12 into court, and also on condition of appellee's paying the further sum of $9,589.20, which it subsequently paid, which last sum was the amount of the tax upon the increase made by the Board of Equalization in the value of certain personal property, which increase in the value of personal property the District Court found to be valid. The District Court, in said suit, found, as one of its findings of fact, that the increase by the Board of Equalization in the value of the mining claims was not based upon any information or evidence had or obtained by them, but was made arbitrarily and capriciously and for the purpose of imposing upon the plaintiff an unjust share of the burden of taxation. The sum of $14,133.12 so paid by the plaintiff to the county for the tax levied upon the original assessment, which the appellee had tendered was accepted by the County Treasurer and ex officio tax collector, "on account of any moneys which might ultimately be determined as due from said company for its tax for said year." An appeal was taken by Cochise County from this decree of the District Court. The Supreme Court of the Territory on said appeal reversed the decree of the District Court, and remanded the case for new trial. (8 Ariz., 221.) Subsequently to the rendition of this decision by the Supreme Court of Arizona an effort was made to compromise the claim of the County; and an agreement of compromise was entered into, under authority of a resolution of the Board of Supervisors adopted July 7, 1904, whereby the Copper Queen Company agreed to pay, and did in fact pay, the further sum of $5,661.44 in full settlement of all taxes for the year 1901. Thereupon the
626 injunction suit was dismissed by the appellee. This sum of $5,661.44 so paid to the county under said compromise agreement, has been ever since retained by the county. Subsequently a proceeding in mandamus was instituted against the tax collector of Cochise County to compel him to commence suit against the Copper Queen Company for the collection of the balance of the tax for the year 1901, upon the ground that the compromise so made was unauthorized and void. The Supreme Court of Arizona held, in the mandamus suit, that the Board of Supervisors had no authority to compromise said tax, and granted a writ of mandamus. This present suit for the collection of the tax and enforcement of the penalties provided by statute, was instituted pursuant to the said order in the mandamus case.

The testimony at the trial of this case was undisputed that the raise made by the County Board of Equalization in the assessment

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of said eight patented mining claims was not based upon any evidence as to the value of the claims so raised and that it was in fact arbitrary. It was also established by the uncontradicted evidence that certain of the patented mining claims which were thus raised in value by the Board of Equalization were assessed far in excess of their full cash value. It was shown that the duplicate assessment roll was made out by the Assessor in the following form:

(Here follows Duplicate Assessment Roll, marked page 627.)

628 The tax being then unpaid, at the close of business, on th third Monday of December, 1901, the tax collector turned i the delinquent list, which was certified to the Board as being a tru list of all persons and property owing taxes for that year that had no been paid, and the amount thereof. On this list appears the pro erty of the defendant company as sixty-five patented mines, contain ing 636 acres, valued en masse at $3,180.00 for the real estate an $55,431.00 for the improvements thereon; and also an additiona list or statement which shows the several amounts in which the valu ations of eight of said mining claims were increased by the Board o Equalization, giving the amounts of the increase, but not giving either the original valuations of the said eight mines or the total valuation of them or any of them as increased.

The said delinquent list was made out in the following form:

(Here follows Delinquent Tax Roll, marked page 629.)

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630 Under the law of 1903 the property thus delinquent was carried into the back tax books of that year; and it is for the foreclosure of the Territory's lien for taxes on the different pieces of real estate thus appearing in the back tax book that this suit is brought. The back tax book, put in evidence, showed the property of the defendant company, the total valuation of $3,833,034.76; the total taxes, $122,657.09; the amount paid on account $23,265.76; balance due, $99,391.33; and in enumerating the several tracts and parcels of land thus remaining unredeemed, it gives sixty-five mining claims, containing 636 acres; valued en masse at $3,180.00; improvements thereon, $55,431.00, and mentions by name sixty-four claims. It gives the same number of acres for the list named therein as is given in all the other lists, and also contains all the other valuations for real estate and improvements. It gives the list of the increased valuations of the several mining claims and improvements which were increased by the Board, but gives no total valuation of said separate pieces of property, after the addition of such increase. This list was entered in the back tax book in the following form:

(Here follows Back-tax Book, marked page 631.)

632 The list of mining claims set forth in Paragraph IV of th
Complaint is as follows:

"Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Coppe
Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion
Cumberland, Cave, Dividend Wedge, Ellie Coon, East Side, Fran
Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks
Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York
Lookout, Mammoth, Malvina, New York, Neptune, North Star
Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear
Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wad
Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle, Isle, Co
lumbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite
Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes
South View, Tack, Union, Virginia.

Said mining claims consisting of 636 acres assessed at $3,180.00.

The complaint differs from the list shown in the assessment roll i
this: It names the "Dividend Wedge," the "Howell," the "Belle
and the "Isle," which are omitted from the assessment roll; it omit
the "Dividend," the "Wedge," the "Powell," the "Little Joker," th
"Sunrise" and the "Belle Isle," all of which are included in the as
sessment roll; it names only sixty-five claims, whereas, the assessmen
roll names sixty-seven.

The complaint diff[illegible]rom the list shown in the duplicate asses
ment roll in this: it names the "Howell" the "Dividend Wedge,
the "Belle" and the "Isle," all of which are omitted from the dupli
cate assessment roll; it omits the "Powell" the "Dividend
633 the "Wedge" and the "Belle Isle," all of which are include
in the duplicate assessment roll.

Again the complaint differs from the list contained in the delin
quent roll in this, it names the "Dividend Wedge," the "Howell
and the "Silver Bear," all of which are omitted from the delinquen
roll, and it omits the "Dividend" the "Wedge" and the "Powell," al
of which are included in the delinquent roll. The complaint differ
from the list in the back tax book in this: It names the "Dividen
Wedge," the "Howell," the "Silver Bear," the "Belle" and the "Isle,
all of which are omitted from the back tax book, and it omits th
"Dividend," the "Wedge" and the "Powell," and the "Belle Isle,
all of which are included in the back tax book.

Neither the complaint in this case nor the assessment roll, nor th
delinquent tax list discloses what the total assessed valuation of an
individual piece of real estate amounted to or what was the amoun
of taxes due on any of these separate mining claims or pieces of rea
estate.

It was shown by the testimony of the Assessor that there wer
some 280 patented mining claims in Cochise County at the time thi
assessment in 1901 was made, and that they were and had bee
assessed at a uniform rate of $5.00 per acre as a rule.

This finding of facts in the nature of a special verdict is made an
rendered by the Supreme Court of Arizona this 20 day of May, 191

EDWARD KENT,
Chief Justice of the Supreme Court of Arizona.

634 & 635 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, F. A. Tritle, Jr., Clerk of the Supreme Court of the Territory of Arizona, do hereby certify the above and foregoing to be a full, true and complete copy and Transcript of the Record in a certain cause lately pending in said court, No. 1130, wherein The Territory of Arizona, at the relation and to the use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, was appellant, and The Copper Queen Consolidated Mining Company, a corporation, was appellee, including the Abstract of Record, Motion to Dismiss the Appeal, Decision, Opinion, Judgment, Motion for Re-hearing, Notice of Appeal, Petition for and Allowance of Appeal, Affidavit of Value, Assignment of Errors, Bond on Appeal, Statement of Facts, and all minute entries had and entered of record, as the same remain on file and of record in my office.

And I further certify that the same constitute the record in said cause.

And I further certify that the attached Citation, and Orders of Enlargement, are the originals issued by said Supreme Court.

In witness whereof, I have hereunto set my hand and the seal of said Court, this fifth day of August, A. D., 1911, at Phœnix, Arizona.

[Seal Supreme Court of Arizona.]

F. A. TRITLE, JR.,
Clerk Supreme Court.

636 In the Supreme Court of the Territory of Arizona.

Citation.

THE TERRITORY OF ARIZONA at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cohise, in the Territory or Arizona, Plaintiff and Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

The United States of America to The Copper Queen Consolidated Mining Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., within sixty days from the date hereof pursuant to an appeal taken to said Supreme Court of the United States from a judgment

of affirmance in a certain action wherein the Territory of Arizona, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, is appellant, and you, the said Copper Queen Consolidated Mining Company, are appellee, lately rendered in the Supreme Court of the Territory of Arizona, and there show cause why the said judgment should not be corrected and why speedy justice should not be done to the appellant in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 23 day of March, in the year of our Lord One Thousand Nine Hundred and Eleven.

EDWARD KENT.
Chief Justice of the Supreme Court of Arizona.

637 [Endorsed:] No. 1130. In the Supreme Court of the Territory of Arizona. The Territory of Arizona, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant, v. The Copper Queen Consolidated Mining Company, a corporation, Defendant and Appellee. Citation. Due and legal service of the within citation is hereby acknowledged this 19th of April, 1911. E. E. Ellinwood, att'y for Defendant and Appellee. Law offices of E. S. Clark, Rooms 23, 24, 25, 26, 27, 28 Bank of Arizona Building, Prescott, Arizona. Filed April 27, 1911. F. A. Tritle, Jr., Clerk.

638 In the Supreme Court of the United States.

No. 1130.

THE TERRITORY OF ARIZONA at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cohise, in the Territory or Arizona, Plaintiff and Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Order Enlarging Time for Docketing and Filing Record in the Supreme Court of the United States.

The above named appellant having appealed to the Supreme Court of the United States from the judgment of the Supreme Court of the Territory of Arizona, and good cause having been shown why the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States should be enlarged, it is hereby ordered that the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States, be and the same is hereby enlarged until and including the 19th day of July, 1911, and the

return day of the citation heretofore filed and served upon such appeal is hereby enlarged and extended until said last named day.

Dated May 20, 1911.

EDWARD KENT,
Chief Justice Supreme Court, Territory of Arizona.

639 [Endorsed:] No. 1130. In the Supreme Court of the United States. The Territory of Arizona, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Appellant, vs. The Copper Queen Consolidated Mining Company, a Corporation, Appellee. Order of Enlargement. Filed May 20, 1911. F. A. Tritle, Clerk.

640 In the Supreme Court of the United States.

No. 1130.

THE TERRITORY OF ARIZONA, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Plaintiff and Appellant,

vs.

THE COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation, Defendant and Appellee.

Order Enlarging Time for Docketing and Filing Record in the Supreme Court of the United States.

The above named appellant having appealed to the Supreme Court of the United States from the judgment of the Supreme Court of the Territory of Arizona, and good cause having been shown why the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States should be enlarged, it is hereby

Ordered that the time within which the case may be docketed and the record filed with the Clerk of the Supreme Court of the United States, be and the same is hereby further enlarged until and including the 16th day of August, 1911, and the return day of the Citation heretofore filed and served upon such appeal is hereby further enlarged and extended until said last named day.

Dated June 17, 1911.

EDWARD KENT,
Chief Justice Supreme Court, Territory of Arizona.

641 [Endorsed:] No. 1130. In the Supreme Court of the United States. The Territory of Arizona, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Appellant, vs. The Copper Queen Consolidated Mining Company, a Corporation, Appellee.

Order further enlarging time for Docketing and Filing Record in the Supreme Court of the United States. Filed June 17, 1911. F. A. Tritle, Jr., Clerk.

Endorsed on cover: File No. 22,847. Arizona Territory Supreme Court. Term No. 89. The Territory of Arizona, at the Relation and to the Use of J. N. Gaines, Tax Collector in and for the County of Cochise, in the Territory of Arizona, Appellant, vs. The Copper Queen Consolidated Mining Company. Filed August 24th, 1911. File No. 22,847.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 89.

THE TERRITORY OF ARIZONA AT THE RELATION AND TO THE USE OF J. N. GAINES, AS TAX COLLECTOR IN AND FOR THE COUNTY OF COCHISE, IN THE TERRITORY OF ARIZONA, APPELLANT,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF ON BEHALF OF APPELLANT.

Statement of the Case.

This is an action brought by the Territory (now State) of Arizona to foreclose its tax lien against sixty-five patented mining claims of the Copper Queen Consolidated Mining Company, to the extent of $120,039.35, with interest, etc., as prayed in the original complaint filed in the District

Court of Cochise County, Arizona, February 12, 1908. This sum is the amount of taxes due from appellee upon levies made against its property for the year 1901.

During the taxing period of that year the appellee returned to the assessor of Cochise County, as required by statute, a list of its property subject to taxation, including in said list, as one tract, consisting of 636 acres, and at the lump sum of $3,180, the 65 patented mining claims herein referred to, each of said claims being designated by name in the list, but without separate valuation (Transcript, pp. 89-90). This list, including acreage and valuation, was adopted by the assessor of Cochise County, and was by him carried into the assessment roll for 1901. No other mining claims than the 65 referred to were returned by or assessed to the appellee for that year.

It appears, by comparing the list of claims as returned by appellee with the list as it appears in the assessment rolls and other tax records and in the complaint, that there are several variances affecting possibly, as the list appears in some of the records, five or six of the claims named, but, in so far as the "Duplicate Assessment Roll" is concerned, which roll contains the description and valuations of property as finally corrected and equalized, appellant contends that there is in reality no variance, the discrepancies being so trivial, as we shall later show, as not to merit consideration.

The Board of Supervisors of Cochise County, sitting as a board of equalization, added, after due notice, $3,464,895 to the total assessment of the Copper Queen Company, $3,260,000 of which was added to the valuation of the patented mines above referred to (Trans., pp. 118-119, folios 257-259). This raise, as will appear by the record last referred to, was apportioned to eight of the sixty-five claims returned, in amounts varying from $50,000 to $1,000,000 and included improvements on these eight claims. It should be borne in mind that all of the eight claims, the valuation of which was so raised, are described alike throughout.

On September 1, 1901, a statute known familiarly as the "Andrews Law" became effective in Arizona (Revised Statutes of Arizona, 1901, pars. 3875-6), which is as follows:

"3875. (SEC. 45.) Any person, firm or corporation who is dissatisfied with the amount of his, their or its assessment as fixed by the board of equalization may appeal from the action of said board to the district court of the county in which said board holds its sessions, on or before the twentieth day of September following the adjournment of said board. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the board of equalization and served upon the clerk of said board in the same manner as a summons in a civil action: *Provided*, That no appeal shall be taken unless the appellant shall, before taking the appeal, pay to the county treasurer of such county the full amount of taxes levied and assessed upon the property of the appellant by the board of supervisors in accordance with the valuation of such property as fixed by said Board of Equalization, which payment shall be accompanied by a written protest addressed to and filed with such county treasurer, setting forth the reasons why the person, firm or corporation, making such payment, deems the amount of such assessment erroneous or excessive. At the time of such payment the county treasurer shall deliver to the party making the payment a receipt for the amount so paid, which receipt shall be served upon the clerk of said Board of Equalization, with notice of appeal, together with a copy of such protest. Unless such payment is made before the taking of such appeal, the appeal shall be dismissed. Immediately upon the service of such notice of appeal the clerk of the board of supervisors shall transmit such notice, receipt and copy of protest, together with a certified copy of the record of the proceedings of said Board of Equalization relating to the assessment of the person, firm or corporation taking such appeal, to the clerk of the district court of such county. For such services the clerk of the board of supervisors shall receive a fee of ten dollars, which shall be paid by the party ap-

pealing to said clerk at the time of the service of the notice of appeal, and unless so paid the appeal shall be dismissed. Upon the filing of said notice of appeal, and the certified copy of the records aforesaid, the clerk of the district court shall docket the appeal in the name of the appellant, as plaintiff, and the county, as defendant, and such appeal shall be heard by the court, without a jury, at its first session thereafter, unless both parties consent, in writing, to a continuance of such hearing. At such hearing the court shall hear evidence touching the actual cash value of the property assessed, and shall take into consideration its character, whether improved or not, its surroundings, and, if it be productive, the amount of its average annual yield, and from the evidence submitted shall determine the actual cash value of such property at the time of the assessment, and must render its decision at once unless both parties consent, in writing, to a longer time. The decision of the court shall be in writing, and a certified copy thereof shall be delivered to the board of supervisors, who shall cause the assessment roll to be corrected accordingly. Upon the hearing of such appeal it shall be presumed that the valuation of the property fixed by the Board of Equalization is correct, and the burden of proof shall be upon the party appealing to prove to the satisfaction of the court that such valuation is erroneous or excessive. If it be determined by the court that the amount of such assessment is excessive, judgment shall be rendered in favor of the appellant and against the county for the amount of taxes which the court determines to be excessive, with interest thereon at the rate of seven per cent per annum from the time of such payment, and the costs of the appeal, which shall be paid as other judgments against the county. If the court shall determine that the actual cash value of the property is greater than the valuation fixed by said Board of Equalization, judgment shall be rendered in favor of the county and against the appellant for the taxes due upon the value of such property as determined by the court in excess of the amount fixed by said Board of Equalization, which judgment shall, from the time of its rendition, be a lien upon all the

real and personal property of the appellant within the county, and execution may be issued to enforce said judgment as in civil cases.

"3876. (SEC. 46.) The intent and purpose of the foregoing section is to have all property and subjects of taxation fairly assessed, at the value which would be realized therefrom by cash sale, but not a forced sale thereof, in such manner as such property and subjects are usually sold, and for this purpose the power and authority conferred by the foregoing section upon the court shall be liberally construed. But said court is expressly prohibited from reducing the valuation of any property below the fair cash value of the property, or what the property would sell for cash."

This law had been passed by the legislature in March, 1901, and because of its provision that taxes must be prepaid before an appeal could be taken from valuations of property fixed by boards of equalization, it had become very generally known prior to September 1.

Taxes did not become delinquent at that time until the third Monday in December (Revised Statutes, 1901, par. 3908); therefore the appellee, Copper Queen Consolidated Mining Company, had from September 1, 1901, until September 20, 1901, within which to appeal, if it so desired, from the valuation fixed by the Board of Equalization July 17, 1901. We think this was ample time, and we are also convinced that having ignored this plain, adequate, and exclusive statutory remedy, a court of equity was not open to it. Nevertheless, one day prior to the time the "Andrews Law" took effect, the appellee filed a bill in equity in the District Court of Cochise County, tendering therein the sum of $14,132.12 as the total amount of taxes due by it for the year 1901 upon said mining claims and all other property included in the assessment hereinbefore referred to (Trans., p. 61, fol. 133). This sum represented the tax on the property of appellee at exactly the same valuations as fixed by the owner itself in its return heretofore referred to (Trans.,

p. 59, fol. 128; p. 61, fol. 131), plus an addition of $73,500 to the valuation of its stock of merchandise, which appellee in its bill admitted ought to be added "in order to equalize the valuation of merchandise." The bill admits the validity of the original assessment (Trans., p. 53, fol. 116); admits the ownership and correctness of the list of 65 patented mining claims as set down and assessed by the assessor; admits that it had made a sworn return of these mining claims as 636 acres at $5 per acre to the assessor (Trans., p. 59, fol. 128; p. 61, fol. 131); does not complain of any misdescription, lack of description or variances, or that the action of the Board of Equalization in raising its assessed valuations on eight of the claims comprising the 136 acres did not operate to raise the valuation of the whole tract of 65 claims making up the 636 acres; but only that the valuation fixed was too high as compared with other like property in the county and Territory—not that it exceeded the cash value of the property (County of Cochise *vs.* Copper Queen Consolidated Mining Company, 8 Ariz., 221, reading page 234).

Thereafter such proceedings were had that on December 23, 1901, the District Court of Cochise County rendered its findings of fact and conclusions of law to the effect that so much of the raise of $3,160,000 made on July 17 by the Board of Equalization as exceeded the sum of $358,895 was "arbitrary and capricious" and therefore fraudulent and void; that said Copper Queen Consolidated Mining Company had already paid to the county treasurer the sum of $14,133.12, "the amount conceded by it to be due for taxes for the year 1901," and thereupon decreed that the tax collector should be enjoined from collecting any further taxes from said company for the year 1901 in excess of the sum of $9,132.64, together with a penalty of five per cent for delinquency, making a total of $9,589.27 in addition to what had already been paid (Trans., pp. 63-64). In other words, the trial court in that case added to the original assessment $285,395, and $50,000 of this raise was upon the hoisting works and improvements on the "Silver Spray"

mine, one of the eight claims to the valuation of which the Board of Equalization had added materially at its July meeting (Trans., p. 65, fol. 141).

The County of Cochise in due time appealed from this judgment to the Supreme Court of the Territory of Arizona, which court reversed said judgment on the grounds, among others, that the record failed to disclose either a proper pleading or any proof of fraudulent overvaluation or any valuation of appellee's property in excess of its cash value—the statutory standard of valuations for taxation purposes (County of Cochise *vs.* Copper Queen, etc., *supra*).

The appellee, though it had initiated this action, did not see fit to press it after this reversal, but, on the contrary, on June 7, 1904, attempted to compromise the same (Trans., p. 68, fol. 146) by the payment of the further sum of $5,661.44, $5,000 of which sum was to satisfy costs, expenses, and attorneys' fees incurred by the county in said cause, and the balance, $661.44, was to go into the treasury of the county. It is not clear whether the compromise as proposed was ever accepted formally by the county, but the money offered was paid in, and the attorneys representing the county approved the deal (Trans., p. 68-69, fols. 147-150). On June 25, 1904, the plaintiff (appellee here) had moved the dismissal of the action, and the court granted the order (Trans., p. 68).

In the meantime the legislature of 1903 had passed a new law relating to the collection of delinquent taxes (Act 92, Laws 1903). The compromise above referred to was made in flat contravention of section 91 of that law; and, an action having been brought in the Supreme Court of Arizona to compel the tax collector of Cochise County to bring the present action, the court, in that proceeding, holding said compromise void, awarded the writ of mandate prayed for (Trans., p. 271, fol. 589; Territory *ex Rel.* Clark, Attorney General, *vs.* Gaines, tax collector, 11 Ariz., p. 270). Thereafter, in due time, pursuant to the mandate issued in

the Gaines case, *supra*, this action was brought. Judgment was for defendant in the trial court, and an appeal therefrom was taken to the Supreme Court of the Territory of Arizona, where the judgment of the trial court was affirmed (Trans., p. 271). The judgment of the Supreme Court was based, in substance, upon two propositions:

First. That although the appellee had returned its 65 patented mines *en bloc*, and had therefore waived its right to a separate assessment in tracts or parcels, the Board of Equalization of Cochise County, by raising the valuation of eight of said 65 claims, disregarded such return and "segregated" from the group so returned these claims and imposed thereon an additional assessment (Trans., p. 274, fol. 595 *et seq.*). Therefore the discrepancies between the list of claims in the complaint and the list as shown in the various assessment rolls rendered these rolls inadmissible on the ground of variance (Trans., p. 276).

Second. That proof of a raise in the valuation of eight claims out of a group of sixty-five returned *en bloc*, the complaint alleging a raise upon the entire sixty-five *en bloc*, was a substantial variance (Trans., p. 277).

A motion for rehearing was seasonably filed, and, being overruled, this appeal followed.

Assignment of Errors.

Comes now the Territory of Arizona, the appellant above named, and assigns the following as error committed by the Supreme Court of Arizona in the above-entitled action, to wit:

I.

The court erred in holding that there was such a variance between the complaint filed in the court below (as to the names of the sixty-five patented mining claims) and the assessment list, assessment rolls, delinquent list, and back-

tax book as rendered said assessment rolls and lists inadmissible in evidence, for the reason that the discrepancies were trivial, and that as said 65 claims were returned by the appellee *en bloc*, or as one tract, and it returned no other mining claims or group of claims that year, it was immaterial that there were such discrepancies, as the record shows, it being indisputable that the tract as a whole was positively identified by the description appearing on the assessment rolls and back-tax books.

II.

The court erred in holding that proof of a raise in valuation by the Board of Equalization of Cochise County of eight of the sixty-five claims assessed *en bloc* did not constitute evidence of a raise in the value of the entire tract, and that such proof therefore constituted a material variance, for the reason that the entire number having been returned by the taxpayer as one group, block, or tract it had waived its right to a separate assessment of each claim, and the legal effect of the action of the Board of Equalization in raising the valuation of eight of the 65 claims under such circumstances was to add to the valuation of the whole tract. The designation of the eight claims so raised, by name, amounted merely to the assignment of a reason by the board for raising the value of the whole tract.

III.

The court erred in holding that payment of the tax upon the valuation fixed in the original assessment would not render harmless the alleged errors and omissions made in transcribing the names of said sixty-five patented mining claims from list to book, and from the books to the complaint, for the reason that the payment of said original tax is a binding admission on the part of the company that the

original assessment was valid; and for the further reason that the record shows payments in addition to the tax upon the valuation of mining claims as originally fixed, and ignored by the court, to wit: (1) Under the judgment of the District Court of Cochise County, December 23, 1901, upon the addition of $50,000 to the value of "hoisting works and improvements on 'Silver Spray' mine" (Trans., p. 65), amounting at the tax rate of that year, $3.20 per hundred, to $1,600, and a like additional amount under the same judgment upon "buildings and other improvements," making a total additional payment on mining claims of $3,200. (2) Under the attempted compromise of June 7, 1904 (Trans., p. 78), $5,661.44, which sum, under the terms of said compromise, pursuant to appellee's own proposition, was to be applied solely to the tax on mining claims, and, to use the language employed by appellee in proposing said compromise, "which said sum, together with the sum already paid by said company into the treasury of said county, *at the valuation of five dollars per acre, returned by said company upon 65 patented mines, containing 636 acres, in the year 1901, makes the actual basis of valuation per acre of said patented mines in this compromise thirty-seven dollars and fifty cents.*"

IV.

The court erred in affirming the judgment of the trial court in said action and in refusing to enter judgment for the Territory as prayed in its complaint, for the reasons given in the preceding assignments.

ARGUMENT.

The Territorial Supreme Court based its holding of variance on a very careful and minute comparison of the list of the claims incorporated in paragraph IV of the complaint (Trans., p. 2), and the list contained in appellee's sworn return and in each of the various tax rolls. By this exacting comparison the Territorial Supreme Court found that the complaint differed from the original assessment roll in this:

The complaint names:

Dividend Wedge,
Howell,
Bell,
Isle,

all of which, it says, are omitted from the original assessment roll.

The complaint, it says, omits:

Dividend,
Wedge,
Powell,
Little Joker,
Sunrise,
Bell Isle,

all of which are included in the original assessment roll (Trans., p. 275).

In the same manner, the court found that the complaint differed from the duplicate assessment roll in that it names:

Howell,
Dividend Wedge,
Bell,
Isle,

And omits:

Powell,
Dividend,
Wedge,
Bell Isle,

all of which are included in duplicate roll (Trans., p. 276).

By the same process, the court found that the complaint differs from the delinquent tax roll in that it names:

Dividend Wedge,
Howell,
Silver Bear,

And omits:

Dividend,
Wedge,
Powell,

which are included in the delinquent tax roll (Trans., p. 276).

The court found that the complaint differed from the back-tax book in that it names:

Dividend Wedge,
Howell,
Silver Bear,
Bell,
Isle,

And omits:

Dividend,
Wedge,
Powell,
Bell Isle.

(Trans., p. 276.)

The Supreme Court of Arizona concludes that the discrepancies thus revealed constitute a fatal variance between the complaint and each of the tax records, thus rendering the tax records inadmissible in evidence. In this holding, it is our contention that the court committed error.

The court said (Trans., fol. 598, p. 275):

> "Disregarding the discrepancy in the naming of the "Dividend Wedge" and the "Bell Isle" as a mere matter of punctuation, and the writing of "Sun Rise" as a compound name, the error in the names "Howell" and "Powell" and the mention of the "Little Joker" claim in the assessment list is a ma-

terial variance which would render the assessment list inadmissible in proof of the allegations in the complaint."

We may assume, then, that the Supreme Court disregarded, as it should have done, the discrepancies in the naming of the three following claims:

Dividend Wedge,
Bell Isle,
Sunrise.

The court, however, held there was a material variance between "Howell" and "Powell."

In order that it may be made readily apparent that the discrepancy in naming this claim is merely a typographical error, the list of the claims as contained in the original return made by appellee (Trans., p. 89, "Exhibit A") is here referred to for the purpose of showing that the names of the claims in this list, as well as in all of the tax records (Trans., p. 112, "Exhibit C"; p. 128, "Exhibit F"; p. 138, "Exhibit G"), and the list in the complaint (Trans., p. 2, fol. 4), are arranged in alphabetical order. In each and every list the "Howell" or "Powell" is the 37th word, counting each and every word, regardless of punctuation, from the beginning of the list. In each and every case, whether named as "Powell" or "Howell," it falls in the "H's" and, without exception, between "Holbrook" and "Harrison."

It is apparent that "Howell" was intended rather than "Powell," and the circumstances are such that no one could be misled or injured. We submit that this does not constitute a material variance, but is at most a typographical error.

I.

There is no variance between the list in the complaint and the duplicate assessment roll.

The complaint conforms to the duplicate assessment roll save in immaterial discrepancies heretofore noted. The holding of the Territorial Supreme Court that the duplicate assessment roll was inadmissible in evidence to prove the allegations of the complaint was therefore unquestionably error.

It was error to exclude the original tax roll as evidence on the ground of material variance, for the reason that the variance is so slight as to be wholly immaterial and in no way prejudicial to the rights of the tax-payer, and for the further reason that the answer to the complaint, on which this action was tried, expressly admits that the lists of claims in paragraph IV of the complaint is the same, by words and figures, as the list contained in the original assessment roll (Trans., p. 25, par. IV, fol. 55), in the following words:

> "Answering paragraph IV of said complaint, the defendant denies that said assessor legally valued, listed and assessed in the tax list or assessment roll of said county for the year 1901, to and against said Cooper Queen Consolidated Mining Company, upon pages 55 and 56 of said assessment roll, or at all, any real estate; *but defendant admits that between the first Monday in February and the first Monday in June of said year said assessor placed upon the tax list or assessment roll of said county the words and figures as set forth in paragraph IV of said complaint, but denies that the same constitutes any assessment.*"

It was plainly error for the court to exclude all of the tax rolls on the ground of variance, as there is no variance between the duplicate assessment roll and the complaint, and because appellee's answer, as already shown, admitted that the list of claims in the complaint was in words and

figures the same as the list placed upon the original assessment roll by the assessor. It follows that any discrepancies between the complaint and the other tax records do not constitute variance between the complaint and said records, but an irregularity or misdescription, which is cured by statutes in effect at the time the rolls were made up, the lists transcribed from one to another, and at the time this suit was instituted and tried.

It is obvious that the complaint could not have been drawn so that the one list of the claims contained therein would conform exactly to each of the separate tax rolls. It was sufficient to make it conform to the list contained in the duplicate assessment roll.

The discrepancies between the assessment rolls are due to errors in transcribing, and, as such, inconsequential, because of curative statutes heretofore referred to and here set out in full:

Revised Statutes of Arizona, 1887, chapter VIII, par. 2717 (section 91), provides:

> "The entries made in the county treasurer's books, records of the board of supervisors, assessment roll, duplicate assessment roll and the warrants attached thereto, delinquent list and the proof of its publication, or a certified copy thereof, shall be *prima facie* evidence in all judicial proceedings and in all courts in this territory. *And no want of description or misdescription or irregularity in the description of the property assessed upon the assessment roll, if it can be ascertained or proved by any proper or competent evidence what property is intended, shall invalidate the assessment, but the same shall be sufficient and be considered valid both in law and equity.*"

This same statute was re-enacted in the Laws of 1901 (Revised Statutes of Arizona, 1901, chapter VIII, par. 3949, section 118).

Apparently the Supreme Court of Arizona rendered its decision without consideration of the statute just quoted.

That curative statutes are liberally construed in tax cases is now a recognized principle of construction:

Williams *vs.* Board of Supervisors of Albany County (1887), 122 U. S., 154; 7 Sup. Ct. Rep., 1244.

Mattingly *vs.* District of Columbia, 97 U. S., 687.

Luddington *vs.* City of Escanaba, 115 Mich., 288; 73 N. W., 368.

Newyago Portland Cement Co. *vs.* Sheridan Twp., 137 Mich., 475; 100 N. W., 747.

Ensign *vs.* Barse, 107 N. Y., 329; 14 N. E. 400; 15 N. E., 401.

In re Lamb, 51 Hun, 633; 4 N. Y. Suppl., 858.

Grant *vs.* Johnson, 73 Vermont, 268; 50 Atl., 1059.

Smith *vs.* Hard, 61 Vermont, 469; 17 Atl., 481.

State *vs.* Love, 47 N. J. Law, 436; 2 Atl., 810; affirmed by Court of Errors and Appeals, 49 N. J. Law, 235; 9 Atl., 744.

State *vs.* Phillips, 137 Mo., 259; 38 S. W., 931.

Cooley on Taxation (3d edition), chapter X, p. 506 and following, with cases cited.

Revised Statutes of Arizona 1901, Title 62, chapter VIII, paragraph 3937 (section 106), provides:

> "No assessment of property or charge for any taxes shall be considered illegal on account of any irregularity in the tax lists, assessment rolls, or duplicate assessment rolls not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment roll, without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof or the title acquired by the purchaser."

This chapter is amended by act No. 92, page 162, of the Session Laws of 1903. By that amendment paragraph 3937 (section 106) was untouched. We also respectfully refer to section 105, act No. 92, of the Session Laws, 1903, which provides:

> "No irregularity in the assessment roll, or omission from the same, or mere irregularity of any kind in any of the proceedings, shall invalidate any such proceeding, or the title conveyed by the tax deed, nor shall any failure of any officer or officers to perform the duties assigned him or them on the day or within the time specified, work any invalidation of any such proceedings, or of such deed, and no overcharge as to a part of the taxes or costs, and payment of such taxes or costs, shall invalidate a sale for taxes, except as to a part of the real estate sold to the proportion of the whole thereof as such part of the taxes and costs is to the whole amount for which land was sold. Acts of officers *de facto* shall be valid as if they were officers *de jure*, and if a deed would be valid as to the sale for any one tax it shall not be impaired by any irregularity, error in the proceedings or sale for any other tax or taxes."

According to the provisions of the statutes just quoted, the irregularities and discrepancies appearing in the tax rolls are rendered harmless and omissions are especially relieved against.

We respectfully submit that each of the statutes quoted is sufficient in itself to cure the shortcomings complained of in this case. We believe that the effect of all these statutes is to validate the rolls and harmonize them with the complaint beyond question. The complaint, conforming to one of the rolls, by virtue of the curative statutes, conforms to all of them sufficiently to render them all admissible in evidence in support of the allegations of the complaint.

If the complaint itself presents a slight variance from the tax rolls, this defect is rendered harmless by Revised Statutes 1901, par. 1293 (section 84), which provides:

> "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

In some instances a slight variance between the complaint and the proof offered might be very material. In such case a direct injury would result to the party against whom such evidence was allowed. In the case at bar the description, relating as it does to a tract assessed as an entirety, is amply sufficient to identify the tract assessed, and it has never been and cannot be contended that the appellee was deceived or misled or that any one could be deceived or misled as to the identity of the property.

A review of the authorities sustains this position and satisfies us that the Territorial Supreme Court erred in holding that the discrepancies upon which the rolls were rejected constituted material variance:

Baker *vs.* Insurance Co. (Or.), 48 Pac., 699.

> "The property insured is described in the policy as 'Situate on and confined to the premises now actually owned and occupied by the assured, to-wit: Lots 27 and 28, block 8, In *Harlington Addition to Mt. Tabor*, Multnomah County, Oregon', and it is described in substantially the same manner in the complaint; but the evidence shows that the premises upon which the dwelling was located are correctly described as *lots 27 and 28, in block 8, Harlem Addition to East Portland*, and it was further shown, over the objection of defendant, that there was no such place as 'Harlington Addition to Mt. Tabor'. Held no variance."
>
> Baker *vs.* Insurance Co., *supra*.

The opinion quoted refers to Hatch *vs.* Insurance Co., 67 Cal., 122; 7 Pac. 411, which holds that if enough of the description is correct to *identify the property* other portions of it which are erroneous may be disregarded when the question is merely what property was insured.

Battles *vs.* Barnett (Texas), 100 S. W., 817:

This case holds that the variance between the petition in a boundary suit describing a survey as No. 446, and proof that it was No. 436, was immaterial, where it appeared that the number stated in the petition was a clerical error.

Other decisions bearing out our contention are:

Coffey *vs.* Hendricks, 66 Tex. 676; 2 S. W., 47.
Montgomery *vs.* Carlton, 56 Tex., 361.
Benton *vs.* Yurann, 55 Pac., 676.
Haflin *vs.* Winkleman, 18 S. W., 433.

The last case relates to a purchase-money note which was set out in the petition. The note offered in evidence referred to a certain deed for description of the land, and stated that it was recorded in book 10, pages 219 and 220. The note, as set out in the petition, described the deed as being recorded in book 10, pages 419 and 420. The note sued on bore date of March 29th, 1883, and recited the execution of a deed of even date therewith, and the deed offered in evidence bore date of March 27, 1883.

Held, not a material variance.

Bigham *vs.* Tinsley, 130 S. W., 506.
Rothchild *vs.* Harris, 125 N. Y. Supp., 41.
Nash *vs.* Towne, 5 Wall., 689-704.

Mr. Justice Clifford, in delivering the opinion in this case, said:

> "No variance ought ever to be regarded as material where the allegations and proof substantially correspond."

This statement has many times been acquiesced in by this court:

Grayson *vs.* Lynch, 163 U. S., 468, 485; 41 L., 230.
Pape *vs.* Allis, 115 U. S., 363-373; 29 L., 393.
Washington & G. R. Co. *vs.* Hickey, 166 U. S., 532; 41 L., 1105.

In view of the general trend of the decisions that a variance, unless it amounts to a failure of proof, or is misleading to defendant, ought never to be regarded, the holding of the Territorial Supreme Court was erroneous. So far as appellant is able to find, after a careful and painstaking search, clerical and typographical errors have never, save in this one instance, been held to constitute a material variance.

The situation now under consideration is discussed in the third edition of Cooley on Taxation (vol. 1), page 534:

> "Of the errors that creep into the records of tax proceedings very many are merely clerical, or occur in consequence of a failure to put in proper form the evidence of transactions in themselves correct. Tax proceedings must stand by the record; and a failure to make the proper record may be as fatal as a failure to take the proceeding of which the record should have been made.
>
> "If, however, the defect in a record is obviously clerical and nothing more; that is to say, if the record on its face sufficiently shows that the proper steps have in fact been taken, but there is some error on the part of the recording officer in putting the evidence upon the record in precise conformity to the law; some omission of a word or the accidental employment of one word for another, or any similar error which cannot mislead—the mistake may be overlooked, and the court, when the record becomes the subject of judicial investigation, may by intendment supply what is omitted, and correct what is erroneous, and then sustain the record as though the proper corrections had been made by the recording officer himself."

After all, however, the important point is, that the claims having been returned *en bloc*, there was only one tract to be described; therefore the correct enumeration of practically all of the 65 claims comprising the group settles the question of identity beyond question. If any one could possibly suffer by the discrepancies complained of it would be the State—if the appellee could possibly be affected at all thereby it would be advantageously.

Opinion of Supreme Court of Arizona in this case (Trans., p. 272, fol. 591):

> "Returning its property *en masse* was a voluntary reliquishment of the known right of separate assessment. The taxpayer should not now be heard to complain" (citing cases), "nor does the fact that the list returned was not verified by the oath of the superintendent of the mining company lessen its effect as such waiver. It is, nevertheless, a voluntary statement by the appellee of the manner in which its property might be properly assessed."

II.

Proof of a raise in the valuation of eight claims out of a group of sixty-five assessed en bloc was in legal effect proof of a raise in the valuation of the whole tract, and such proof did not constitute a variance from the allegation of the complaint that the whole tract, or all the claims, had been raised.

We think it plain that the court erred in holding (Trans., p. 277, fol. 601) that proof of a raise upon eight claims constituted no proof of a raise upon the 65 (of which the eight were part) alleged in the complaint to have been raised. To so hold, the court must have ignored what it had already held, that the whole 65 were returned as one tract. This being true, how could value be added to eight or any number of the component parts of the tract without adding to the value of the whole? And if we are to accept appellee's position, these raises could have had no other possible effect, as it contended vigorously that, as these eight claims had not been separately assessed originally, no separate raise could be made, as there was no original valuation of any specific claim to be added to. If this position is right, it follows that the raises must be treated as having been made to the whole. In fact, the Supreme Court of Arizona says, in its opinion (Trans., p. 274, fol. 595):

"It might be argued successfully that had the Board of Supervisors raised the assessment upon the group, such a raise might have been valid."

We think at this point an excerpt from our motion for rehearing is peculiarly appropriate:

"The error of the court in this respect we think is due to its failure to effectuate the obvious intention of the board, which was to assess this whole property in an amount appropriate to its actual value, whether it be regarded as a raise of eight claims only or as a raise of the whole group. Such being the intention of the Board, and inasmuch as the law favors the payment of just and equitable taxes, it naturally follows that if ineffectual as a raise on particular claims, the assessment operated as a raise upon the whole group, and the same became impressed, *eo instante*, with the obligation to pay the tax.

"Having determined that the company had, by its return, voluntarily relinquished its right of separate assessment, the court should also have found as a necessary sequence thereto, that the company had thereby relinquished its right to claim the privilege of paying the tax upon any portion less than the whole, and of discharging the lien upon that portion without paying upon the remainder. As the taxpayer has relinquished of his own accord his privilege of separate assessment, he has as a matter of course relinquished also the right of paying upon any part less than the whole, for the exercise of that right depends upon the manner in which the original assessment has been made; otherwise, it would be futile to say that the original assessment *en solido* was valid, when by claiming his right of segregaton he could later avoid the payment of any taxes, on the ground that he had been deprived of that right. To allow this, would be to permit him to take advantage of his own wrong.

"It follows then that it was not the raising of the valuation of certain particular mines which deprived him of his right of segregation, but it was due to the voluntary act of the taxpayer in returning his property *en masse*. It follows, also, that the legality of

the raise cannot thereafter be questioned on that particular ground.

"While the decision of the court compels us to take different ground respecting the effect of the raise than we have heretofore held, we are convinced by the court's reasoning that the Board could not lawfully segregate these eight claims from the mass and raise the valuation of them separately, there having been no separate assessment. But we most respectfully differ essentially from the conclusion of the court that this action was void. If it be true that there could be no segregation, either for the purpose of permitting the payment of taxes upon a particular tract less than the whole, then it follows that a raise of any part of the original group is in effect a raise of the whole. For it must be apparent that the value of the whole tract is equal to the value of all its parts, so that when the value of part was raised, the amount so added merely increased the aggregate value of the whole tract.

"The court concedes that the Board had the right to raise the value of the whole tract. If the acts of the Board have this effect, then the raise is valid and the court should give it effect. The taxpayer is not injured by the irregularity. Its position is precisely the same as though the Board had expressly added to the value of the whole tract. It would have to pay exactly the same amount of taxes in either case to discharge the tax lien, and payment under the present status of the record will free its property just as effectually as though it had paid the same sum under a raise of the whole tract.

"The court will bear in mind that there is no testimony in the record that the raised valuation exceeded the cash valuation of the whole tract, and even the evidence that was admitted on the question of valuation was flagrantly inadmissible, for the reasons stated in our reply brief.

"This effectually disposes of the theory of the court that 'there are in effect two assessments for the same year against each of the eight claims raised; one, an assessment commingled with that of sixty-four other claims *en bloc;* the other separate and distinct.' There was but one assessment of the whole tract, and

in legal effect one raise of the whole tract. This also harmonizes the action of the Board with the original return made by the taxpayer, and disposes of the theory of this court that the Board 'disregarded the original classification.' If the Board could not raise segregated portions of the whole, then of course it did not. If the act of the Board operated to raise the value of the whole, then it is the duty of this court to give such acts effect, especially as such course leaves the taxpayer in the same situation as though the raise had in terms been applied to the whole tract.

"This situation also harmonizes the variances between the complaint and the assessment rolls, etc., and renders the differences immaterial. For if the several mines listed are to be treated as one tract for the purpose of assessment, as they must be under the holding of this court, then if there be sufficient description to identify the tract, there is complete harmony between all the lists. It of course will not and cannot be suggested that there is any doubt raised by the variances as to the identity of the tract. Indeed, the description of the property as a tract is ample under paragraph 2652, Revised Statutes 1887, subdivision six, which reads in part as follows:

" 'And the description of real estate shall be sufficient if the same can be readily identified thereby.' "

"If the taxpayer pays on the claims described in the complaint, he pays on so many of them as are also named in its return and upon the assessment rolls and thereby discharges the lien on all. If claims are mentioned in the complaint which are not named in the list returned or the assessment rolls, the taxpayer is not hurt, as he only pays the taxes upon the claims actually owned and returned. No additional tax is imposed by reason of the claims erroneously added in the complaint, and in any event the taxpayer is fully protected as to all the claims in the tract when he satisfies the judgment, as the judgment must be against the whole tract. In case the taxpayer suffers a sale under execution, it is not injured because some claims belonging to and returned by it are omitted from the sale, neither is it injured if some of the

claims not returned by it are not included in the sale, as it loses nothing and the purchaser takes nothing thereby. But viewed in any light, the complaint correctly describes enough claims to identify the tract, and that is sufficient, especially in view of the numerous admissions in the record by appellee that the tract described in the complaint is one with the tract returned and assessed.

"This brings us to a consideration—now hardly necessary—of the holding of the court set forth on page 12 of the opinion:

" 'By the action of which complaint is made here' " (the raise upon the eight claims), " 'the Board deprived the appellee of this right' " (the right to pay on any one of parcels separately assessed, discharging the lien thereon, without paying on the remainder). " 'Upon the raise being made, it had the legal right to determine upon which, if any, of the claims so raised it would pay. If it determined to pay upon none, it was, nevertheless, obliged to pay a portion of the tax thereon if it exercised its right to pay upon the 57 claims remaining, for the tax collector, under par. 2676, *supra* (re-enacted par. 3900, R. S., 1901), could not receive the tax upon less than the entire 65 claims, that being the least subdivision appearing upon the assessment roll. If it determined to pay upon one or more of the eight so raised and abandon the remainder, it would have to pay the tax upon the raise, together with the tax upon the entire sixty-five claims as originally assessed.' "

"The 'tax upon the entire sixty-five claims as originally assessed,' valued at $3,180 in the aggregate, amounts to $101.70, or an average of $1.56 per claim. Under the first proposition stated by the court it would lose eight times $1.56, or $12.48. In the latter case it might lose either $1.56 or $10.92, dependent upon how many of the eight claims might be abandoned."

"(We doubt whether the payment of any of these sums—as taxes—would be a great hardship to the appellee; the ordinary taxpayer would be quite willing that the court should disregard both propositions on the ground of *de minimis*.)

"Finally, if the raise made by the Board is treated

by the court—as rightly it ought to be—as a raise upon the whole group, then the Missouri cases cited by the court on page 15 of its opinion have absolutely no application. If the assessment was on separate parcels, and the parcels were fatally misdescribed so that they could not be identified, the Missouri cases might apply. Here, however, the taxpayer owned a tract comprising 65 claims, which it returned and which were assessed *en masse*. The only question is as to the identity of the tract, and as there is and can be but one, and as admittedly the tract described in the complaint is the same tract returned, there is no variance."

III.

The court erred in holding that payment of the tax upon the valuations fixed in the original assessment would not render harmless the alleged errors and omissions made in transcribing the names of said sixty-five patented mining claims from list to book and from the book to the complaint, for the reason that the payment of said original tax is a binding admission on the part of the company that the original assessment was valid; and for the further reason that the record shows payments in addition to the tax upon the valuation of mining claims as originally fixed, and ignored by the court, to-wit: (1) Under the judgment of the District Court of Cochise County, December 23, 1901, upon the addition of $50,000 to the value of "Hoisting Works and Improvements on 'Silver Spray' mine (Trans., p. 65), amounting at the tax rate of that year—$3.20 per hundred—to $1,600, and a like additional amount under the same judgment upon buildings and other improvements"; making a total additional payment on mining claims of $3,200. (2) Under the attempted compromise of June 7, 1904 (Trans., p. 78), $5,661.44, which sum, under the terms of said compromise pursuant to appellee's own proposition, was to be applied solely to the tax on mining claims, and, to use the language employed by appellee in proposing said com-

promise, "which said sum, together with the sum already paid by said company into the treasury of said county *at the valuation of five dollars per acre returned by said company upon 65 patented mines, containing 636 acres, in the year 1901, makes the actual basis of valuation per acre of said patented mines in this compromise thirty-seven dollars and fifty cents.*"

We plead that the sum of $14,133.12 was paid as a partial payment, but we positively do not plead it as a *partial payment of the tax arising upon the original assessment* as laid by appellee and the assessor. On the contrary, we distinctly plead it *as a part payment of the sum of $122,657.09*, being the amount of tax due on September 9, 1901 (after equalization), the date of the payment (Trans., p. 6, fol. 12). No matter how it was paid, received, or receipted for, the fact remains that said sum was the *precise amount of tax arising upon the original assessment* and is expressly pleaded by appellee as full payment (Trans., p. 28, fol. 61). In the latter citation appellee says that "it tendered to the treasurer and tax collector * * * the full sum of $14,133.12, being the taxes due by plaintiff (appellee) upon *its property aforesaid* (the italics are ours), for the year 1901, * * * but that said tax collector refused to accept the same." And on page 28, fol. 61: "That thereafter, at the December, A. D. 1901, term of said court, at the trial of said action, the payment of said sum was tendered by said Copper Queen Consolidated Mining Company * * * for said amount of taxes to said tax collector, and said sum was received and accepted by him for said amount of taxes."

We admit that the tax collector could not accept $14,000 as full payment of $122,000, but this has nothing to do with the fact that the sum of $14,133.12 was the exact amount of the original tax, and that it was voluntarily paid by the appellee.

We contend that the payment of this money, together with other acts of the appellee, fraught with similar consequences,

estops appellee from saying that the assessment was not valid or that the description of its property was defective.

Moreover, the record shows that in December, 1901, it paid the further sum of $9,589.27 on these taxes (Trans., p. 29), and that another payment was made on June 7, 1904, pursuant to an attempted compromise (Trans., p. 29). Is it possible that appellee paid in these various sums without knowing whether it was paying the tax on its own property or that of some one else? In its own suit, which it refers to in its answer (par. XIX, Trans., p. 28, fol. 61 *et seq.*), it describes the property almost literally as we describe it (Trans., p. 53, fol. 117).

IV.

Question of overvaluation cannot be inquired into in this proceeding.

First. Because no appeal was taken by the defendant as provided by paragraph 3875, Revised Statutes of Arizona, 1901.

In paragraphs XX and XXI of its answer appellee attempts to plead that its property was overvalued. It is expressly precluded from doing this by statute. Par. 3875, R. S. 1901, points out the only manner in which alleged overvaluation by a county board of equalization can be corrected, and that is by appeal to the district court, as a condition precedent to which appeal the full amount of the alleged unjust tax must be prepaid. The district court has power to refund should it find any part of the tax to be excessive, or to render judgment for the balance should it find the cash value of the property to be more than that fixed by the board of equalization. This remedy, known as the "Andrews Law", became effective September 1, 1901, although of course it was known of by every lawyer long before that time, so that appellee had until September 20th, at

least twenty days, within which to appeal, if it so desired. Instead of doing this, as the records of this case show, it chose to file a bill in equity (Copper Queen Consolidated Mining Company *vs.* M. D. Scribner, Tax Collector *et al.* No. 787) just one day before the "Andrews Law" went into effect, wherein it sought to restrain the collection of any tax in excess of $14,133.12. Of course, it sought in this adroit proceeding to escape the payment of its taxes in advance and at the same time to get all the benefit of an appeal. This, under a rule too familiar to need mentioning, it cannot do. The "Andrews Act," of course, is intended to and does cover all cases of overvaluation, whether caused by fraud, prejudice, ignorance, mistake, or discrimination. It matters not *how* the overvaluation is reached; the court will only determine whether it has been reached and act accordingly. But, as we have shown, neither fraud nor overvaluation is properly pleaded, so that these charges could not be considered under any view of the case.

Second. Because appellee resorted to equity, but did not pursue its remedy to judgment.

Third. Because of par. 3875 the court has no jurisdiction to consider questions of valuation in this proceeding, for the reason that the court cannot alter or change valuations.

Mead *vs.* Haines, 82 Mich., 264.

Pacific Postal Tel. Co. *vs.* Dalton, 51 Pac., 1073.

Fourth. The court cannot consider charge of overvaluation, for the further reason that the actual value of the property is not pleaded.

Par. 3836, R. S. Arizona, 1901.

Humbird Lumber Co. *vs.* Thompson, 83 Pac., 945.

State *vs.* Saddler, 23 Pac., 799.

A. & P. Ry. Co. *vs.* Yavapai Co., 21 Pac., 768.

Copper Queen Con. Mining Co. *vs.* Scribner, 71 Pac., 946.

Fifth. The allegation of fraud is insufficient, being too general. No valuation is pleaded as basis of alleged fraudulent overvaluation.

Auditor General *vs.* Stiles, 83 Mich., 463.
Hamilton *vs.* Rosenblat, 8 Misc. App., 237.
Black on Tax Titles, 175, 216 and 219.
Maish *vs.* Arizona, 164 U. S., 611.
State *vs.* Saddler, *supra.*

Fraudulent overvaluation cannot be pleaded or shown when statutory remedy for correction of overvaluation existed and was not availed of and no excuse shown.

Black on Tax Titles, 219, and cases cited under note 24.

Excessive valuation cannot be attacked collaterally in an action to recover taxes.

Austin *vs.* Westchester Tel. Co., 28 N. Y. Supp., 77.

Relief from illegal tax must be sought in the statutory manner.

Rickets *vs.* Crewdson, 79 Pac., 1042.

Par. 3872 of the Revised Statutes of Arizona, 1901, provides as follows:

> "The decision of the board as to whether the assessed value of any property shall be increased, and, if so, to what amount, shall be final, *and shall not thereafter be questioned in any proceeding involving the amount of the taxes legally and equitably due thereon, unless an appeal is taken as hereinafter provided.*"

Lastly, appellee here does not deny the ownership of the property assessed to it, or any part of it. It does not deny that the description it furnished was good enough when it turned it in under oath. It was good enough for it when it

paid the taxes thereon, *based on its own valuation*, in 1901 (Trans., p. 193). It was good enough when it adopted it *verbatim* in its injunction suit, the amended bill in which appellee introduced in evidence in the trial court (Trans., p. 53). It was good enough for it when it paid the additional tax based thereon, as decreed by Judge Davis in the injunction suit (Trans., p. 65). It was good enough for it when it made its "compromise" with the Supervisors of Cochise County, wherein it sought to evade the tax herein sued for upon payment of $5,661.44 (Trans., p. 79), which said compromise it attempted to plead, description and all, by way of abatement to this action, though the compromise was declared void (Territory *vs.* Gaines, 93 Pac., 281). The same kind of a list was good enough for it prior to 1901 (Trans., p. 187). It has been good enough for appellee all these years and throughout all its devious attempts to effect a settlement on the basis of its own home-made valuations. It ought to be good now. And, according to the overwhelming weight of authority, it is.

Respectfully submitted,

ELIAS S. CLARK,
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GEORGE P. BULLARD, *Attorney General of Arizona,*
Attorneys for Appellant.

WILLIAM C. PRENTISS,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

Clerk Supreme Court, U. S.
FILED
FEB 26 1914
JAMES D. MAHER
CLERK

THE TERRITORY OF ARIZONA, at the relation and to the use of J. N. Gaines, as Tax Collector in and for the County of Cochise, in the Territory of Arizona,

Appellant,

vs.

COPPER QUEEN CONSOLIDATED MINING COMPANY, a Corporation,

Appellee.

No. 89.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

STATEMENT AND BRIEF OF APPELLEE.

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IN THE

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OCTOBER TERM, 1913.

THE TERRITORY OF ARIZONA, at the relation and to the use of J. N. Gaines, as Tax Collector in and for the County of Cochise, in the Territory of Arizona,

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vs.

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

STATEMENT AND BRIEF OF APPELLEE.

STATEMENT.

This is an appeal from the Supreme Court of the Territory, now State, of Arizona. The action was a special statutory proceeding for the enforcement of the lien of the State for the payment of certain taxes in the year 1901 against certain patented mining claims in the County of Cochise amounting to $120,039.35, being a tax upon the increased valuations of the mining claims of appellee claimed to have been made by the

Board of Supervisors of Cochise County. The action was the statutory proceeding for the enforcement of the tax lien upon specific property. Judgment was entered for the defendant by the trial court (see Opinion, Printed Record, p. 35). Appeal being made by the complainant to the Supreme Court of Arizona the judgment was affirmed (see Opinion, Printed Record, p. 268). Appeal having been taken by the complainant from this judgment of the Supreme Court of Arizona (then a territory) to this court, the Supreme Court of Arizona, under the provision of the statute of the United States (18 Stat. L. 27) regulating the appellate jurisdiction of this court over the judgments of territorial courts, and also under the provision of the Organic Act of the Territory, Sec. 36, made for this appeal its statement of facts (Printed Record, p. 287).

THE ISSUES MADE BY THE PLEADINGS.

The complaint (Printed Record, pp. 1 to 10) set out the original assessment, the sixty-five patented mining claims, consisting of 636 acres, being assessed in bulk as 636 acres at $5.00 per acre, making $3,180.00, and also certain personal property which is not in controversy in this action, and increase of said assessment of the mining claims by the Board of Supervisors of Cochise County, so that the assessment of the mining claims, after the increase, amounted to $3,260,000.00. The complaint alleged that there was a balance due with interest amounting to $120,039.39 on June 8, 1904, and prayed for judgment for said amount with interest at the rate of 10 per cent from that date and 4 per cent additional for the fees of the tax collector and 25 per cent upon the aggregate amount found due for attorney's fees, and that the judgment be a first and paramount lien upon the lots, tracts and parcels of land, that is, the said mining claims.

THE ANSWER.

The defendant, while specially and generally demurring to the sufficiency of the complaint as allowed under the Arizona practice, filed its answer (Printed Record, pp. 24 to 35), wherein it denied the validity of the assessment and the alleged increase, and set up a compromise and satisfaction of the tax claim in 1904 whereby the county was paid the sum of $5,666.44 in full settlement of the alleged claim. The contention of the defendant as denying the validity of the assessment and the alleged increase, was sustained both by the trial court and the Supreme Court, as will be hereafter seen, so that it became unnecessary for either court to consider the further defense in paragraphs 20 and 21 of the answer (Record, pp. 31 to 33), setting up that the action of the Board of Equalization was not only violative of the organic law of the Territory, but also violative of the Fourteenth Amendment of the Constitution of the United States denying to the defendant the equal protection of the laws.

As the facts on which this unlawful discrimination was based, were specifically found by the Supreme Court in its finding of facts, we herewith set out these averments of the answer:

Discrimination Pleaded by Defendant.

"And further answering the said complaint of the plaintiff by way of answer, the defendant alleges:

"That the defendant is a corporation under the laws of the State of New York and engaged in the mining business in the Territory of Arizona, and is protected by Section 15 of the Organic Act of the Territory of Arizona against discriminating and unequal taxation, in that it is provided by

said section that the land or other property of non-residents shall not be taxed higher than the land or other property of residents. And defendant says that this equality of taxation required by the organic law of the Territory requires equality in valuation as well as in the rate of taxation.

"Defendant says that the action of the Board of Equalization of Cochise County, Arizona, set forth in the complaint in what is termed the increase of assessment of the Silver Spray Mine, the Holbrook Mine, the Copper Queen Mine, the Copper Jack Mine, the Baxter Mine, the Atlanta Mine, the Dividend Mine and the Rucker Mine, and on the improvements thereon on said respective mines, was not only void in law, as an assessment of said several properties, for the reason that there was no valid assessment upon any one of said separate properties to which the said several increases could lawfully attach, but that said attempted increases were wholly without warrant of law and were fraudulent in law in this, that the same were made knowingly and willfully in violation of the uniform system of valuation of that class of property theretofore adopted and continually enforced by the Board of Equalization in the assessment of properties of that class in said county and of the assessment of said properties of that class in other counties.

"The several properties referred to by said names were patented mining claims, and in view of the recognized uncertainty of determining the cash value of such properties, growing out of the uncertainty and speculative character of the mining business, the custom had been established in this and other counties of the Territory, to fix the cash value of such mining claims at the uniform rate of five dollars per acre; and this custom of assessment was not occasional but habitual, and had been acquiesced in and enforced by the assess-

ing officers and by the Board of Equalization and also acquiesced in by the mine owners of the Territory. The assessment roll of Cochise County, Arizona, included, for the year 1901, several hundred mining claims assessed upon this basis, and this was the uniform rule adopted throughout the Territory, and had been for many years in the assessment of this class of property.

"The Board of Equalization of this county made no investigation whatever to determine the value of said mining claims, nor did it hear any evidence thereon. Defendant says that the action of the board in this matter was for the purpose of placing an unfair and undue burden upon the defendant, discriminating against this defendant, so that this defendant will be compelled to pay more than its share of its just taxes for the year 1901, and so that the property of the defendant should be taxed higher than the property of others, including residents of the Territory. Defendant says that this inequality in valuation thus attempted by the Board of Equalization of Cochise County was intentional, and made with the purpose of and with the necessary effect of placing upon this defendant an unequal burden of taxation compared with residents of the Territory, and with other owners of the same class of property.

"Defendant says that, as it has paid its full share of taxation upon the said valuation of its property, made in accordance with the valuation of other properties of the same class in the Territory, and that the amount sued for in this petition is based upon said illegal attempt to place upon this defendant an unequal burden of taxation.

"Defendant says that the action of the said Board of Equalization was not only violative of the organic law of the territory, but also violative of the Fourteenth Amendment of the Constitution

of the United States, in denying to this defendant the equal protection of the laws.

XXI.

"And further answering the said complaint of the plaintiff by way of answer, the defendant alleges that the defendant is a corporation under the laws of New York and engaged in the mining business in the Territory of Arizona, and is protected by Section 15 of the Organic Act of the Territory against discriminating and unequal taxation, in that it is provided by said section that the land or other property of non-residents shall not be taxed higher than the land or other property of residents. Defendant says that this equality of taxation required by the organic law of the Territory requires equality in valuation as well as in the rate of taxation.

"Defendant says that the action of the Board of Equalization of Cochise County, Arizona, set forth in the complaint in what is termed the increase of assessment of the Silver Spray Mine, the Hollbrook Mine, the Copper Queen Mine, the Copper Jack Mine, the Baxter Mine, the Atlanta Mine, the Dividend Mine and the Rucker Mine, and on the improvements thereon on said respective mines, was not only void in law, as an assessment of said several properties, for the reason that there was no valid assessment upon any one of said separate properties to which the said several increases could lawfully attach, but that said attempted increases were wholly without warrant of law and were fraudulent in law in this, that the same were made knowingly and willfully in violation of the uniform system of valuation of that class of property theretofore adopted and continually enforced by the Board of Equalization in the assessment of properties of that class in said

county and of the assessment of said properties of that class in other counties.

"The several properties referred to by said names were patented mining claims, and in view of the recognized uncertainty of determining the cash values of such properties, growing out of the uncertainty and speculative character of the mining business, the custom had been established in this and other counties of the Territory, to fix the cash value of such mining claims at the uniform rate of five dollars per acre; that this system of assessment was not occasional, but habitual, and had been acquiesced in and enforced by the assessing officers and by the Board of Equalization and also acquiesced in by the mine owners of the Territory. The assessment roll of Cochise County, Arizona, for the year 1901, included several hundred mining claims assessed upon this basis, and this was the uniform rule adopted throughout the territory, and had been for many years in the assessment of this class of property. The Board of Equalization of this county made no investigation whatever to determine the value of said mining claims, nor did it hear any evidence thereon. Defendant says that the action of the board in this matter was for the purpose of placing an unfair and undue burden upon this defendant, discriminating against this defendant, so that this defendant will be compelled to pay more than its share of its just taxes for the year 1901, and so that the properties of the defendant should be taxed higher than the property of others, including residents of the Territory. Defendant says that this inequality in valuation thus attempted by the Board of Equalization of Cochise County was intentional and made with the purpose of and necessary effect of placing upon this defendant an unequal burden of taxation as compared with residents of the Territory, and

with other owners of the same class of property.

"Defendant says that not only was this attempted increase unlawful and fraudulent, in that it was made for the purpose of discriminating against the defendant, and of making it bear unequal burdens of taxation as compared with residents of the territory and owners of the same class of property, but that it was also illegal and void, in that the valuation thus placed was in excess of the then cash value of said properties, according to the standard fixed by the laws of Arizona, and was an excessive and over valuation of said properties.

"Defendant says that it has paid its full share of taxation upon the said valuation of its property made in accordance with the valuation of other property of the same class in the territory, and that the amount sued for in this petition is based upon said illegal attempt to impose upon this defendant an unequal burden of taxation.

"Defendant says that the action of the said Board of Equalization was not only violative of the organic law of this territory, but was also violative of the Fourteenth Amendment to the Constitution of the United States, in denying to this defendant the equal protection of the law.

"Wherefore, having fully answered, the defendant prays that it may go hence without day, and for costs."

The Facts in the Cause as Found by the Supreme Court of Arizona in Its Special Finding of Facts for This Appeal.

As the statement of appellant as to the facts disclosed by the record is in our opinion defective and misleading we adopt as our statement the statement

of facts made by the Supreme Court of Arizona, which is as follows: **(Bold-face type is ours.)**

An appeal herein to the Supreme Court of the United States having been allowed on the 22nd day of March, 1911, the Supreme Court of Arizona makes and orders filed this, its statement of facts in the nature of a special verdict on such appeal.

This is a special statutory proceeding brought under Act No. 92 of the Laws of 1903 of the Territory of Arizona, which was adopted from the statute of the State of Missouri to enforce the lien for territorial and county taxes for the year 1901 on the property described in the complaint, said taxes amounting with interest and costs to the sum of $120,039.35 on the 8th day of June, 1904, together with interest thereon since that date, at the rate of 10 per cent per annum, and the further sum of 4 per cent of the amount found due as the tax collector's fee and the further sum of 25 per cent of the amount found due as the tax attorney's fee. The case was tried in the lower court without a jury.

Judgment was entered in favor of the defendant, appellee, to the effect that the plaintiff, appellant, take nothing by its action; from which judgment the appellant appealed to this court. This court, on appeal, affirmed the judgment of the lower court. The facts as found by the Court are as follows:

The appellee, the Copper Queen Consolidated Mining Company, is a corporation doing business and owning real and personal property in Cochise County, Arizona. During the time provided by law for the assessment of property for territorial and county purposes, in the year 1901, it listed and returned to the Assessor of Cochise County for assessment certain patented min-

ing claims belonging to it, being sixty-five in number and listed as follows: Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave (Dividend-Wedge-Ellie-Coon), East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Little Joker, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunrise, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail, Deer, Bisbee, Bell Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars & Stripes, South View, Tack, Union and Virginia.

The tax list so returned appeared upon its face to be verified by the oath of the superintendent of the mining company, **but, in fact, was not so verified.** Said list, as returned, included among other property the aforesaid sixty-five patented mining claims as one tract, which tract was stated therein to comprise 636 acres and was valued at $3,180.00, and the improvements thereon valued at $55,431.76. Other real and personal property was returned in said list, and all said property, including said patented mines, was listed at a total valuation of $368,139.76. **A portion of the patented claims included in said list are not contiguous to any of the others.**

The assessment as entered and shown upon the original assessment roll is as follows:

CHART

TOO

LARGE

FOR

FILMING

At a meeting of the County Board of Supervisors sitting as the Board of Equalization for Cochise County, held on July 17th, 1901, the said Board of Equalization raised the assessment upon eight of the group of sixty-five claims originally assessed *en masse*, in amounts varying from $50,000.00 to $1,000,000.00 each. The action of the Board of Equalization in making this raise is disclosed by the minutes following:

> "In the matter of the equalization of the assessment of the properties belonging to the Copper Queen Consolidated Mining Company:
>
> "This matter coming on this day regularly to be heard before the Board of Equalization pursuant to a notice heretofore served upon said company in writing, and which notice appears in the minutes of said board, and in which said notice it was proposed to change and correct the valuation of said company's property as the same appears upon said assessment roll, by adding thereto the sum of $3,464,895.00; for the reason that the sum fixed in said assessment roll appears to be too small; and this being the day and hour fixed in said notice for the hearing, and pursuant to a notice so given Walter Douglas, Superintendent and Agent of said company, appeared before the board in behalf of said company and made statements regarding said valuations, and his arguments in reference thereto, and the board being now fully advised in the premises, finds it necessary to add to the assessed valuation of the property of said company on the assessment roll as follows, to-wit:

Silver Spray Mine	$1,000,000.00
Hoisting Works and improvements on said mine	50,000.00
Holbrook Mine	1,000,000.00
Hoist and improvements thereon	10,000.00
Copper Queen Mine	50,000.00
Copper Jack Mine	50,000.00
On buildings and other improvements	50,000.00
On Baxter Mine	250,000.00
On Atlanta Mine	250,000.00
On Dividend Mine	350,000.00
On Rucker Mine	200,000.00
Stock of Mdse. in C. Q. store and warehouses	203,520.00
Surveying instruments	375.00
Assaying outfit	600.00
Horses	400.00
Or a total valuation of	$3,464,895.00"

Thereafter the rate of taxation for county and territorial purposes was fixed and levied upon all the taxable property in Cochise County at $3.20 per $100.00 of valuation.

The tax so assessed upon the property of the appellee as raised, amounted to the sum of $122,657.09. Whereupon, the appellee filed an injunction suit in the District Court of Cochise County, prior to September, 1901, to enjoin the collection of the tax, upon the ground that the said increase therein had been fraudulently made, and that it was an over valuation of its property. It tendered, in said suit, the full sum of $14,133.12, being the amount of the tax upon all of its property, real and personal, as assessed for said year, prior to the said increase thereof by the Board of

Equalization. The District Court granted an injunction against the collection of that portion of the tax in controversy here upon condition of the payment of the sum of $14,133.12 into court, and also on condition of appellee's paying the further sum of $9,589.20, which it subsequently paid, which last sum was the amount of the tax upon the increase made by the Board of Equalization in the value of certain personal property, which increase in the value of personal property the District Court found to be valid. The District Court, in said suit, found, as one of its findings of fact, that the increase by the Board of Equalization in the value of the mining claims was not based upon any information or evidence had or obtained by them, but was made arbitrarily and capriciously and for the purpose of imposing upon the plaintiff an unjust share of the burden of taxation. The sum of $14,133.12 so paid by the plaintiff to the county for the tax levied upon the original assessment, which the appellee had tendered, was accepted by the County Treasurer and *ex officio* tax collector, "on account of any moneys which might ultimately be determined as due from said company for its tax for said year". An appeal was taken by Cochise County from this decree of the District Court. The Supreme Court of the Territory on said appeal reversed the decree of the District Court, and remanded the case for new trial (8 Ariz. 221). Subsequently to the rendition of this decision by the Supreme Court of Arizona an effort was made to compromise the claim of the county, and an agreement of compromise was entered into, under authority of a resolution of the Board of Supervisors adopted July 7, 1904, whereby the Copper Queen Company agreed to pay, and did in fact pay, the further sum of $5,661.44

in full settlement of all taxes for the year 1901. Thereupon the injunction suit was dismissed by the appellee. This sum of $5,661.44, so paid to the county under said compromise agreement, has been ever since retained by the county. Subsequently a proceeding in *mandamus* was instituted against the tax collector of Cochise County to compel him to commence suit against the Copper Queen Company for the collection of the balance of the tax for the year 1901, upon the ground that the compromise so made was unauthorized and void. The Supreme Court of Arizona held, in the *mandamus* suit, that the Board of Supervisors had no authority to compromise said tax, and granted a writ of *mandamus*. This present suit for the collection of the tax and enforcement of the penalties provided by statute was instituted pursuant to the said order in the *mandamus* case.

The testimony at the trial of this case was undisputed that the raise made by the County Board of Equalization in the assessment of said eight patented mining claims was **not based upon any evidence as to the value of the claims so raised and that it was in fact arbitrary. It was also established by the uncontradicted evidence** that certain of the patented mining claims which were thus raised in value by the Board of Equalization were **assessed far in excess of their full cash value.** It was shown that the duplicate assessment roll was made out by the assessor in the following form:

CHART

TOO

LARGE

FOR

FILMING

The tax being then unpaid, at the close of business, on the third Monday of December, 1901, the tax collector turned in the delinquent list, which was certified to the Board as being a true list of all persons and property owing taxes for that year that had not been paid, and the amount thereof. On this list appears the property of the defendant company as sixty-five patented mines, containing 636 acres, valued *en masse* at $3,180.00 for the real estate and $55,431.00 for the improvements thereon; and also an additional list or statement which shows the several amounts in which the valuations of eight of said mining claims were increased by the Board of Equalization, giving the amounts of the increase, but **not giving either the original valuations of the said eight mines or the total valuation of them or any of them as increased.**

The said delinquent list was made out in the following form:

(See same attached hereto, opposite this page.)

Under the law of 1903 the property thus delinquent was carried into the back tax books of that year; and it is for the foreclosure of the Territory's lien for taxes on the different pieces of real estate thus appearing in the back tax book that this suit is brought. The back tax book, put in evidence, showed the property of the defendant company, the total valuation of $3,833,-034.76; the total taxes, $122,657.09; the amount paid on account, $23,265.76; balance due, $99,391.33; and in enumerating the several tracts and parcels of land thus remaining unredeemed, it gives sixty-five mining claims, containing 636 acres; valued *en masse* at $3,180.00, improvements thereon $55,431.00, and mentions by name sixty-four claims. It gives the same number of acres for the list named therein as is given in all the other lists, and also contains all the other valuations for real estate and improvements. It gives the list of the increased valuations of the several mining claims and improvements which were increased by the board, but **gives no total valuation of said separate pieces of property, after the addition of such increase.** This list was entered in the back tax book in the following form:

CHART

TOO

LARGE

FOR

FILMING

The list of mining claims set forth in paragraph IV of the complaint is as follows:

Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle, Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Culprit, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia.

Said mining claims consisting of 636 acres assessed at $3,180.00.

The complaint differs from the list shown in the assessment roll in this: It names the "Dividend Wedge," the "Howell", the "Belle" and the "Isle", which are omitted from the assessment roll; it omits the "Dividend", the "Wedge", the "Powell", the "Little Joker", the "Sunrise" and the "Belle Isle", all of which are included in the assessment roll; it names only sixty-five claims, whereas, the assessment roll names sixty-seven.

The complaint differs from the list shown in the duplicate assessment roll in this: It names the "Howell", the "Dividend Wedge", the "Belle" and the "Isle", all of which are omitted from the duplicate assessment roll; it omits the "Powell", the "Divi-

dend", the "Wedge" and the "Belle Isle", all of which are included in the duplicate assessment roll.

Again the complaint differs from the list contained in the delinquent roll in this: It names the "Dividend Wedge", the "Howell" and the "Silver Bear", all of which are omitted from the delinquent roll, and it omits the "Dividend", the "Wedge" and the "Powell", all of which are included in the delinquent roll. The complaint differs from the list in the back tax book in this: It names the "Dividend Wedge", the "Howell", the "Silver Bear", the "Belle" and the "Isle", all of which are omitted from the back tax book, and it omits the "Dividend", the "Wedge" and the "Powell", and the "Belle Isle", all of which are included in the back tax book.

Neither the complaint in this case nor the assessment roll, nor the delinquent tax list discloses what the total assessed valuation of any individual piece of real estate amounted to or what was the amount of taxes due on any of these separate mining claims or pieces of real **estate.**

It was shown by the testimony of the Assessor that there were some 280 patented mining claims in Cochise County at the time this assessment in 1901 was made, and that they were and had been assessed at **a uniform rate of $5.00 per acre as a rule.**

This findings of facts in the nature of a special verdict is made and rendered by the Supreme Court of Arizona this 20th day of May, 1911.

EDWARD KENT,
Chief Justice of the Supreme Court of Arizona.

OPINION OF THE DISTRICT JUDGE.

Judge Doan, of the District or trial Court, in deciding the cause for defendant, after stating the facts as found by the Supreme Court in the foregoing statement of facts, proceeded:

> "Under the law of 1903 the pieces of property thus delinquent that have been forfeited for the non-payment of the taxes, were carried into the back tax book, and it is for the foreclosure of the government's lien for taxes on the different parcels of real estate thus appearing in the back tax book that this suit is brought.
>
> "We may not in this case render a judgment against the defendant for the amount of the unpaid taxes found due. This is not a personal action, but an action *in rem*. While nominally brought against the defendant, it is really an action against the several pieces of real property for the amount of taxes upon the said several pieces of real property due and unpaid, with penalties and costs. This distinction must be borne in mind in determining the two questions that were presented in this case. First, whether there was a valid assessment originally, and, second, whether the raises in the valuation made by the Board of Equalization were valid, or were in any instance invalid by reason of having been made arbitrarily, and not upon knowledge of the values or upon evidence relative thereto given before the Board.
>
> "In determining the question whether there was sufficient description of the property to constitute a valid assessment we must bear in mind that a description of property sufficient to impose upon the owner an obligation to pay the taxes thereon, or to serve as a basis for a money judg-

ment against the owner as defendant, for which all of his property would be liable under execution, might be insufficient to describe the property with the accuracy necessary to sustain a judgment against the separate tracts of land that constituted such real property for the amount of taxes and penalties due from each separate tract, and therefore to support a decree for the foreclosure on such separate tracts of real property of the lien for taxes in favor of the government on them. The question is not whether the defendant company owes an amount for taxes to the government and should pay it, and it is not whether the assessment sufficiently describes the property to collect a debt from the company because of taxes, but it is whether there is a sufficient description of several tracts of land with their several valuations, and the amount of taxes severally due upon them to enable such taxes to be recovered by a foreclosure of the lien against such tracts of land. Part of the property returned consisted of 65 patented mines, with the aggregate acreage of 636, valued at $3,180 for the real estate, and $55,431 for the inmprovements thereon. The valuation of eight of these mines was increased by the Board of Equalization. There was a definite amount of increase added to them, but no ascertainment of the original valuation of said eight mines, or either of them, and no total valuation after the increase. It is a matter of common knowledge that patented mines are not of uniform value. It is likewise a matter of common knowledge that they are not of uniform area or acreage. It is therefore impossible to ascertain the value placed on any of the 65 mines. If we should depend upon the intrinsic value, we have nothing whatever to enable us to fix a certain valuation, if we attempt to fix their values by adopting an

acreage valuation, we are left in the same situation. The maximum area of a mining claim is 20 acres. The average acreage of the 65 named here would be a fraction less than ten acres, which advises us that the mines vary in size from perhaps twenty acres, the maximum, to a minimum that is not ascertainable. The only definite valuation presented to us is represented by the several amounts in which eight of these mines were raised in valuation by the Board of Equalization. The effect of this raise was to increase the total valuation of the property, and the taxes levied thereon by adding the amount of the raise to the original valuation, and without a definite original valuation we cannot find a definite total. There were three partial payments made by the defendant, aggregating $23,265.76. Part of these payments were intended by the defendant to be applied to the taxes on certain pieces of property, but they were not so received by the plaintiff, but were all received on account, and credited generally to the entire amount of taxes claimed, therefore it is impossible to ascertain the proportion of these payments that was credited to the definite amount of taxes on the raised valuation of these eight mines, without ascertaining how much of the said payments were applied to the taxes on the other different pieces of property, and therefore how much was left to be applied to the taxes upon the raise or increase in valuation of these eight mines, and as that is impossible of calculation, we have no means of ascertaining how much yet remains due and unpaid, of the taxes levied upon these added values, even if we consider them as separate certain valuations.

"It was claimed by the plaintiff that the taxes upon all the property on the original valuation or

levy was paid by the defendant, and the only amount of controversy is the amount of the raise, which the defendant claimed to be invalid. This position is not supported by the record. For this to be true would require that the delinquent list and back tax would contain only the eight mines and the personal property raised.

"The complaint herein alleges: 'Thereupon the tax collector made out a list of all persons and property then owing taxes * * * known as the delinquent list.' 'That, thereafter the clerk of the Board of Supervisors made up in a book called the back tax book a correct list * * * of all tracts of land on which back taxes were then due.' The delinquent list and back tax book, to support the theory of the plaintiff should contain only the eight mines raised, and the unpaid taxes against them for only the amount of the raise, whereas both delinquent list and back tax book contain the entire sixty-five patented mines (except the additions and omissions made by mistakes in transcription) and declare the taxes to be due and unpaid on all, and ask to have the lien foreclosed against all.

"The act provides in section 86 'that if on the first day of January, 1904, any of said lands or town lots contained in said back tax book remain unredeemed, it shall be the duty of the tax collector to proceed to enforce the payment of the taxes charged against said tract or lot by suit in courts of competent jurisdiction in the county where the real estate is situate.' The back tax book as placed in evidence shows the property of the defendant company, the total valuation of $3,833,034; the total taxes, $122,657.09; amount paid on account, $23,265.76; balance due, $99,391.33, and in enumerating the several tracts or parcels of land thus remaining unredeemed, gives

'sixty-five mining claims, containing 636 acres; value of real estate, $3,180; improvements thereon, $55,431,' and named sixty-four claims. This list omits three, the Silver Bear, the Little Joker and Sunrise, that are named in the original tax roll, and omits one, the Silver Bear, that is named in the duplicate roll. It omits five that are named in the complaint in this case, and names four that are not named in the complaint. It gives the same number of acres for the list named therein as is given in all other lists, the same valuation for both real estate and improvements thereon. It gives the list of the increased valuation of the several mining claims and improvements, but gives no total valuation of said pieces of property after the addition of such increase. The back tax book thus presents sixty-four distinct tracts or parcels of land described only by their names as separate patented mines as subject to the lien for the unpaid portion of the taxes assessed against the sixty-five mines that constituted the 636 acres, and the improvements thereon which were returned by the owner and assessed by the assessor. This list of sixty-four presented in the back tax book omits three, to-wit, Little Joker, Sunrise and Silver Bear, that were included in the list given by the defendant to the assessor, and included by the assessor in the assessment roll on which the tax was levied. The taxes, therefore, that were assessed against these three mines and that remain unpaid (after the application of their proportions of the partial payments) are included in the unpaid taxes that stand upon the back tax book as a lien upon the sixty-four mines, therein named, in addition to the unpaid taxes of the said sixty-four mines themselves. There has been no separate valuation given of the said three mines, or either of them, or any statement of the separate amount of taxes due

from them or either of them to enable the Court to deduct such amount from the total amount appearing against the 636 acres as represented by the sixty-four mines named. Nor does it appear what part (if any) of the $55,431 improvements upon the mines constituting the said 636 acres may be upon these three mines, or any of them, so that it is absolutely impossible to make any definite calculation of the amount of overcharge against the remaining sixty-four claims that are named as constituting the entire 636 acres and that stand charged with the entire amount of unpaid taxes that are due, not only upon their separate and respective tracts and the improvements on them, but in addition thereto with the amount that cannot be definitely computed, of the taxes originally assessed against the other three mines named, and the improvements thereon, which remains unpaid after deducting their proportion of the partial payments entered as general credits against the entire tax, and therefore is now due and is included in the aggregate amount charged in the back tax book against these sixty-four mines.

"This renders it impossible to comply with the requirements of Section 88 of the Act under which this action is brought, and which is cited above. As we are unable by any system of computation to determine the amount of taxes due upon any separate tract or lot of real estate, and describe such tract of land with sufficient accuracy to enable the Sheriff to execute a deed therefor, we cannot render a judgment for the plaintiff in this case. This condition of affairs renders it unnecessary to determine whether the original assessment was valid, or whether the raise in value by the Board of Equalization was or was not valid.

FLETCHER M. DOAN,
Trial Judge."

The Opinion of the Supreme Court of Arizona.

The cause having been appealed to the Supreme Court, the unanimous opinion of the Court, affirming the judgment of the District Court, was delivered by Judge Lewis. This opinion, omitting the detailed statement of facts, is as follows:

"The description of the sixty-five patented mining claims of the appellee, as found upon the original assessment roll, was sufficient. The statute then in force (Par. 2652, R. S. 1887) provides:

" 'It shall be the duty of the assessor to prepare a tax list or assessment roll, * * * in which book or books he shall set down in separate columns; * * *

" 'Second. All real estate taxable to each inhabitant, firm, incorporated company or association, described by metes and bounds, or by common designation or name, if situated within the limits of any city or any incorporated town, describing by lots, or fractions of lots; if without said limits, giving the number of acres as nearly as can conveniently be ascertained, and the location and township where situate; all improvements upon public lands, describing as nearly as possible the location of such improvements; * * *

" 'Sixth. The total value of all property taxable to each, * * * and the description of real estate shall be sufficient if the same can be readily identified thereby.'

"The name of a mining claim is a 'common designation or name' within the meaning of the statute. By such name the real estate may be 'readily identified'. There can be no valid location of a mining claim without the selection of a name therefor. The name must be inserted in the location notice, is inserted in the patent, and the

notice and patent made a matter of public record. The practice of assessing patented mines by name has obtained too long in this territory to be now questioned. This mode of assessment is a practical construction of the statute of which we may take judicial notice and is of weight in the determination of the validity of an assessment so made.

Copper Queen Mining Co. v. Territory, 9 Ariz. 383.

"The appellee was entitled to a separate assessment of its property in tracts or parcels unless it waived that right by the list it returned to the assessor. The appellant contends that the appellee is estopped by the return of the property described as a single tract or parcel of land from asserting illegality in the assessment here made *en masse.*

"There is force in appellee's argument that there is no technical estoppel *in pais* pleaded or proven. Centennial, Etc., Co. v. Jaub County, Utah, 62 Pac. 1024. Yet the expression is frequently used in tax cases. Inland Lumber Co. v. Thompson (Idaho), 83 Pac. 936, and cases therein cited. The Idaho court reaches the conclusion that in tax cases there should be a liberal application of the principle of estoppel in favor of upholding and enforcing an assessment against the taxpayer. Waiver is a definite expression applicable to the action of appellee in making its list for taxing purposes. Returning its property *es masse* was a voluntary relinquishment of the known right of separate assessment. The taxpayer should not now be heard to complain. Kissimee City v. Drought, 26 Fla. 1, 7 So. 525. Nor does the fact that the list returned was not verified by the oath of the superintendent of the mining lessen its effect as such

waiver. It is, nevertheless, a voluntary statement by the appellee of the manner in which its property might be properly assessed. State *ex rel.* Smith v. Cooper, Town Clerk, 59 Wis. 666, 18 N. W. 438.

"The most important question raised upon the record is as to the validity of the action of the Board of Supervisors sitting as the Board of Equalization in raising the assessment upon eight of the group of sixty-five claims originally assessed *en masse* in amounts varying from $50,000.00 to $1,000,000.00 each.

"The action of the Board of Equalization in making this raise is disclosed by the minutes following:

" 'In the matter coming on this day regularly to be heard before the Board of Equalization pursuant to a notice heretofore served upon said company in writing, and which notice appears in the minutes of said board, and in which said notice it was proposed to change and correct the valuation of said company's property as the same appears upon said assessment roll, by adding thereto the sum of $3,464,895.00; for the reason that the sum fixed in said assessment roll appears to be too small; and this being the day and hour fixed in said notice for the hearings, and pursuant to a notice so given Walter Douglas, superintendent and agent of said company, appeared before the board in behalf of said company and made statements regarding said valuations and his arguments in reference thereto, and the board being now fully advised in the premises, finds it necessary to add to the assessed valuation of the property of said company on the assessment roll as follows, to-wit:

Silver Spray mine	$1,000,000.00
Hoisting works and improvements on said mine	50,000.00
Holbrook mine	1,000,000.00
Hoist and improvements thereon	10,000.00
Copper Queen mine	50,000.00
Copper Jack mine	50,000.00
On buildings and other improvements.	50,000.00
On Baxter mine	250,000.00
On Atlanta mine	250,000.00
On Dividend mine	350,000.00
On Rucker mine	200,000.00
Stock of merchandise in C. Q. store and warehouses	203,520.00
Surveying instruments	375.00
Horses	400.00
Assaying outfit	600.00
Or a total valuation of	$3,464,895.00"

"Paragraph 2654 of the Revised Statutes of 1887 provides:

"'* * * The Board of Equalization shall have power to determine whether the assessed value of any property is too small or too great, and may change and correct any valuation, either by adding thereto or deducting therefrom if the sum fixed in the assessment roll be too small or great, whether said sum was fixed by the owner or the assessor; * * * and the clerk of the Board of Equalization shall note upon the assessment roll all changes made by the board. During the session of the Board of Equalization the assessor shall be present, and also any deputy whose testimony may be required, by the parties appealing to the board, and they shall have the right to make any statement touching such assessment, and producing evidence relating to questions

before the board, and the Board of Equalization shall make use of all other information that they can gain otherwise, in equalizing the assessment roll of the county, and may require the assessor to enter upon such assessment roll any other property which has not been assessed; and the assessment and equalization so made shall have the same force and effect as if made by the assessor before the delivery of the assessment roll to (by) him by (to) the clerk of the Board of Equalization. * * *'

"The raise here made was never entered upon the original assessment roll. This was a mere omission and harmless. Wallapai Mining Co. v. Territory, 9 Ariz. 373.

"The raise was first carried into the tax books by an entry upon the duplicate assessment roll as follows:

(Here follows the schedule.)

"Disregarding for the present a variation in the names of the sixty-five claims, the delinquent tax roll, the back tax book and the back tax bill substantially conform to the duplicate assessment roll, except as to certain entries of payments, penalties and interest.

"It is apparent from an examination of this roll that there are in effect two assessments for the same year against each of the eight claims raised. One, an assessment commingled with that of sixty-four other claims *en bloc;* the other separate and distinct. This is no mere irregularity. The legality of the original assessment as an entirety has been sustained solely upon the ground that the property was so returned by the taxpayer. The board disregarded such return and the validity of its action must be determined under the statute alone. It might be argued successfully that had the Board of Supervisors raised the assessment

upon the group, such a raise would have been valid. But the board segregated from the group certain claims and imposed thereon an additional assessment. It is a fundamental rule of taxation in this territory that a taxpayer may pay upon any one of parcels separately assessed, discharging the lien thereon, without paying upon the remainder. Par. 2676, Revised Statutes of 1887.

"Judge Cooley says:

" 'When two parcels are owned by the same person, if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceedings. It cannot be held in any case that it is unimportant to the taxpayer whether this requirement is complied with or not. Indeed, it is made solely for his benefit; it being wholly immaterial, so far as the interest of the state is concerned, whether separate estates are or are not separately assessed. And where a requirement has for its sole object the benefit of the taxpayer, the necessity for a compliance with it cannot be made to depend upon the circumstances of a particular case, and the opinion of a court or jury regarding the importance of obedience to it in that instance. That method of construing statutes would abolish all certainty.' Cooley on Taxation, page 735.

"By the action of which complaint is made here, the board deprived the appellee of this right. Upon the raise being made it had the legal right to determine upon which, if any, of the claims so raised, it would pay. If it determined to pay upon none, it was, nevertheless, obliged to pay a portion of the tax thereon if it exercised its right to pay upon the fifty-seven claims remaining, for the tax collector, under paragraph 2676, *supra* (re-enacted, paragraph 3900, Revised Statutes 1901), could not receive the tax upon less than the entire sixty-five

claims, that being the lease subdivision appearing on the assessment roll. If it determined to pay upon one or more of the eight so raised and to abandon the remainder, it would have to pay the tax upon the raise, together with the tax upon the entire sixty-five claims as originally assessed.

"The undisputed testimony discloses that these claims were non-contiguous in instances which would have invalidated an original assessment, except for the return. The board in raising this assessment disregarded the original classification, which has been held good as against the appellee solely by reason of its return.

"The board of supervisors, sitting as a Board of Equalization, had no power, under paragraph 2654 of the Revised Statutes of 1887, to segregate from a tract of land returned and assessed as one parcel, a portion thereof and impose thereon an additional assessment, without first determining that such tract was improperly assessed as a whole and causing such tract to be reassessed and raised in subdivisions in such manner as to preserve the right of the taxpayer to discharge the lien of taxes upon such of the several separate tracts as he might elect.

"The question here determined was neither presented nor considered in the case of County of Cochise v. Copper Queen Company, 8 Ariz. 211.

"Upon the trial of the case the Court received all evidence offered subject to the various objections made thereto. To the offers by the plaintiff of the assessment roll, the duplicate assessment roll, the delinquent assessment roll and the back tax book, the defendant objected upon the ground of a variance from the allegations of the complaint.

"The list of mining claims set forth in paragraph IV of the complaint is as follows: 'Sixty-five (65) patented mining claims near Bisbee, Ari-

zona, as follows: Atlanta, Ace of Spades, Amazon, Baxter, Best Piece, Copper Queen, Copper Jack, Copper King, Copper Prince, Copper Bullion, Cumberland, Cave, Dividend Wedge, Ellie Coon, East Side, Frank Cogswell, General, Golden Gate, Goddard, Gardner, Hendricks, Hayes, Holbrook, Howell, Harrison, Iron Monster, Little New York, Lookout, Mammoth, Malvina, New York, Neptune, North Star, Ophir, Rucker, Sun Rise, Space, Surprise, Silver Spray, Silver Bear, Sunny Side, Sacramento, Tip Top, Triangle, Uncle Sam, Wade Hampton, Wood Chopper, White Tail Deer, Bisbee, Belle, Isle, Columbia, Copper Monarch, Copper Crown, Copper Globe, Cuprite, Hardscrabble, Keystone, Lucky Jack, Raymond, Stars and Stripes, South View, Tack, Union, Virginia.'

"Said mining claims consisting of 636 acres.

"Thus naming sixty-five claims.

"It differs from the list shown in the assessment roll in this: It names the 'Dividend Wedge', the 'Howell', the 'Belle' and the 'Isle', which are omitted from the assessment roll; and it omits the 'Dividend', the 'Wedge', the 'Powell', the 'Little Joker', the 'Sunrise' and the 'Belle Isle', all of which are included in the assessment roll; it names only sixty-five claims, whereas the assessment roll names sixty-seven.

"Disregarding the discrepancy in the naming of the Dividend Wedge and the Belle Isle as a mere matter of punctuation and the writing of Sun Rise as a compound name, the error in the names 'Howell' and 'Powell' and the mention of the Little Joker claim in the assessment list inadmissible in proof of the allegations of the complaint.

"Again the complaint differs from the list shown in the duplicate assessment roll in this: It names the 'Howell', the 'Dividend Wedge', the 'Belle'

and the 'Isle', all of which are omitted from the duplicate assessment roll; and it omits the 'Powell', the 'Dividend', the 'Wedge' and the 'Belle Isle', all of which are included in the duplicate assessment roll.

"The variance disclosed renders the roll inadmissible under the complaint.

"Again it differs from the list contained in the delinquent roll in this: It names the 'Dividend Wedge', the 'Howell' and the 'Silver Bear', all of which are omitted from the delinquent roll; and it omits the 'Dividend', the 'Wedge' and the 'Powell', all of which are included in the delinquent roll.

"The delinquent roll is therefore inadmissible.

"And, finally, the back tax book is inadmissible under the objection made, for the complaint differs from the list in the back tax book in this: It names the 'Dividend Wedge', the 'Howell', the 'Silver Bear', the 'Belle' and the 'Isle', all of which are omitted from the back tax book, and it omits the 'Dividend', the 'Wedge', the 'Powell' and the 'Belle Isle', all of which are included in the back tax book.

"The importance of the objections here considered is rendered more apparent by a consideration of the nature of the action. It is an action *quasi in rem* to fix a lien upon specific property. No personal judgment can be had.

"The statutes, Section 88, Act 92, Laws of 1903, provides:

" 'The judgment, if against the defendant, shall describe the land upon which the taxes are found to be due, shall state the amount of taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the territory be enforced and that the real estate

or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said land.'

"This statute was adopted from Missouri, and the prior construction thereof by the courts of last resort of the State of Missouri is, under well-established principles, controlling upon us. A judgment in an action to collect back taxes, differing from the complaint in the description of the property sought to be subjected to the lien of such tax is void. Milner v. Shipley (Mo. 1888), 7 S. W. 175; Vaughan v. Daniels (Mo. 1899), 11 S. W. 573; O'Day v. McDaniel (Mo. 1904, subsequent to the passage of Act No. 92), 80 S. W. 895.

"Nor is the admission of this evidence rendered harmless by the proof that an amount equivalent to the tax upon the property as originally assessed was tendered by the appellee in full payment of its tax for the purpose of bringing a suit in equity to injoin the collection of the tax upon the various raises and subsequently paid to the county in the course of suit, and credited by it upon the entire tax claimed to be due. Assuming that it was paid and accepted as a discharge of the original tax, as appellant now contends was the fact, the amount now in suit is the tax upon the raise. Without a valid original assessment there could be no raise. The fact of payment of the original tax does not dispense with the necessity of proof of an assessment admissable under the facts alleged in the complaint.

"The defendant also objected upon the ground of variance to proof of the action of the board of equalization as disclosed by the minutes of its meetings. Upon the introduction of the various

exhibits showing the separate raises of each of the eight claims therein mentioned, the defendant renewed this objection.

"To determine whether or not the variance is material, the allegations of the complaint must be examined. Paragraph four of the complaint contains the only description of the property sought to be subjected to the tax lien. So far as essential the allegation is sixty-five (65) patented mining claims near Bisbee, Arizona (then follows the list by name as hereinabove set forth), said mining claims consisting of 636 acres assessed at $3,180.00. In paragraph six appears the allegation as to the raise, namely, 'To the valuation of the patented mines and improvements $3,260,000.00.' In paragraph fourteen the pleader alleges the amount due 'all of which is a lien upon the lands and real estate owned by and assessed against said Copper Queen Consolidated Mining Company for the year 1901, as hereinabove set forth.'

"Nowhere is there a reference to the specific raise upon the eight claims against which the lien is now asserted, nor is there a further description thereof. The prayer of the complaint was originally for a foreclosure of the alleged lien against the tract of sixty-five (65) claims as an entirety. By leave of the court, subsequent to the admission of the evidence under consideration, the prayer was amended to read: 'That the said judgment and whole thereof be adjudged and decreed to be the first and paramount lien upon such of the aforesaid described lots, tracts and parcels of land and real estate as the court may, from the proof, adjudge to be subject to a lien for said taxes in favor of the territory of Arizona.' There was, however, no amendment of the allegations of fact upon which relief was sought. The complaint, therefore, alleges a raise of the sixty-five claims

en bloc. The proof of raise upon eight of the sixty-five claims, upon which alone it is now sought to foreclose the lien, is a substantial variance.

"The trial court did not err in rendering and entering judgment for the defendant. The judgment, therefore, is affirmed.

ERNEST W. LEWIS,
Associate Judge.

"We concur:

EDWARD KENT,
Chief Justice.

JOHN H. CAMPBELL,
Associate Justice.

EDWARD M. DOE,
Associate Justice."

POINTS AND AUTHORITIES.

I.

Under the repeated decisions of this Court in the exercise of its appellate jurisdiction over territorial courts, the Court will not disturb the decision of the territorial courts in a construction of revenue or other local statutes unless there is manifest error disclosed. In the case at bar the assignments of error disclose no basis for consideration under this rule.

Idaho & Oregon Land Improvement Co. v. Bradbury, 152 U. S. 509;
Fox v. Haarstick, 156 U. S. 676;
Copper Queen Mining Co. v. Arizona Board, 206 U. S. 474-477;
English v. Arizona, 214 U. S. 359;
Treat v. Grand Canon Ry. Co., 222 U. S. 449;
Strauss v. Foxworth, 34 Sup. Ct. Rep. 422;
Gila Valley G. & N. R. Co. v. Hall, 34 Sup. Ct. Rep. 229;
Work v. United Globe Mine, 34 Sup. Ct. Rep. 274;
Phoenix Railway Co. v. Landis, U. S. Adv. Ops. 1913, p. 179.

II.

Irrespective of the ground upon which the opinion of the Arizona Court was based, the judgment was clearly for the right party, as the facts found by the Court show beyond controversy an arbitrary exercise of the taxing power and the willful and intentional discrimination against the appellee, which was violative of due process of law and the equal protection of the law under the Constitution of the United States.

Raymond v. Chicago Union Traction Co., 207 U. S. 20;

Cummings v. Merchants National Bank, 101 U. S. 153;
Taylor v. N. & L. R. R. Co., 88 Fed. 354;
First National Bank of Albuquerque v. Albright, 208 U. S. 548;
Atchison, Topeka & Santa Fe Ry. v. Sullivan, 173 Fed. 466.

Under the facts found by the Court the tax was not only an intentional and arbitrary discrimination, but as to some of the property it was far in excess of their full cash value at the time.

III.

The defense of an unconstitutional discrimination was properly pleaded as a defense to this action.

Cooley on Taxation, Vol. 2, pp. 459-61;
County of Cochise v. Copper Queen Co., 71 Pac. 946.

This was the ruling in Missouri in the construction of this statute prior to its enactment in Arizona.

State *ex rel.* v. Cunningham, 153 Mo. 642;
Raymond v. Chicago Traction Co., 207 U. S. 20;
Atchison, Topeka & Santa Fe Ry. Co. v. Sullivan, 173 Fed. 456.

IV.

The decision of the Arizona Supreme Court that there was no basis in this case for the enforcement of the statutory tax lien upon real estate under the Arizona statute, was clearly sound and in accord with the prior construction of the statute in Missouri, from which it was adopted.

Arizona Back Tax Law of 1901, Mo. R. S. 1899, Sections 9302 to 9313;

State *ex rel.* Rosenblatt v. Sargeant, 76 Mo. 557;
State *ex rel.* Hays v. Snyder, 139 Mo. 549;
State *ex rel.* Rosenblatt v. Kerr, 8 Mo. App. 125;
Yeamans v. Lepp, 167 Mo. 61;
State v. Illinois and St. L. Bridge Co., 8 Mo. App. 599;
Brown v. Walker, 85 Mo. 262;
Allen v. Buckley, 94 Mo. 158;
State *ex rel.* Kertsner v. Sanford, 127 Mo. 368;
City of Jefferson v. Whipple, 71 Mo. 519;
State *ex rel.* Wyatt v. Wabash Ry., 114 Mo. 1;
State *ex rel.* Flentge v. Burroughs, 74 S. W. 610;
O'Day v. McDaniel, 171 Mo. 529;
Lowe v. Eakey, 82 Mo. 286;
Western v. Flannigan, 120 Mo. 61;
Roth v. Gabbart, 123 Mo. 21;
State *ex rel.* Ward v. Linney, 90 S. W. 844;
City of Hannibal *ex rel.* v. Bowman, 98 Mo. App. 103;
State *ex rel.* Morris v. Cunningham, 153 Mo. 642;
State *ex rel.* Hudson v. Carr, 128 Mo. 229;
Neenan v. City of St. Joseph, 126 Mo. 89;
Stewart v. Allison, 150 Mo. 343;
State *ex rel.* Lane v. Hannibal & St. Joseph Ry., 110 Mo. 265;
State v. Central Pacific Ry. Co., 25 Pac. 442 (Nev.);
Peers v. Read, 48 Pac. 897;
French v. Edwards, 13 Wallace 506;
Frazier v. Prince, 58 Pac. 751 (Okla.);
Territory of Arizona *ex rel.* v. United Verd Copper Co. (*nisi prius*);
Territory of Arizona *ex rel.* v. Gaines, 93 Pac. 281.

In states not having this peculiar plenary procedure, for judicial enforcement of tax liens, the rule is fundamental that a separate assessment of different parcels

owned by the same person is essential to the validity of a proceeding for enforcing a tax lien. This was the construction of the Nevada statute from which paragraph 3900 Arizona 1901 was taken.

See General Statutes of Nevada, Sec. 1096;
State v. Central Pacific Ry. Co. (Nevada), 25 Pac. 442;
Peers v. Reed (Nevada), 48 Pac. 897;
French v. Edwards, 13 Wallace 506;
Frazier v. Prince (Okla.), 58 Pac. 25;
Territory of Arizona, *ex rel.* Gaines, 93 Pac. 281.

A description sufficient to support a personal judgment against the owner or sustain a general lien on his property may be wholly insufficient, as in the case at bar, for a tax lien enforceable only by sale of the specific property assessed.

Black on Tax Titles, Sec. 112, p. 143;
Powers v. Bowdle (N. D.), 54 N. W. 404, 21 L. R. A. 328;
Green v. Lunt, 58 Me. 518;
1st Desty on Taxation, 564, 573;
Bidwell v. Webb, 10 Minn. 82;
Thibodaux v. Keller, 29 La. Ann. 508;
Morristown v. King, 79 Penn 669;
Pfeiffer v. Miles, 48 N. J. Law, 450;
Evans v. Newell, 18 R. I. 38;
Grisson v. Furman, 22 Fla. 581;
Dinge v. Paxton, 60 Miss. 1038;
People v. Reat, 107 Ill. 581;
Keane v. Cannovan, 21 Cal. 308;
People v. Mahoney, 55 Cal. 280;
Hayden v. Foster, 13 Pick. 492;
Bird v. Benlisa, 142 U. S. 664.

V.

There was no estoppel upon the appellee, in the fact that its manager gave a list of the sixty-five separate parcels by name in a group, which can cure the failure to show specific assessment upon the separate properties of the taxes sought to be enforced. No such estoppel was pleaded nor could one exist under the facts found.

8th Ency. Pl. & Pr., p. 7 and cit.

This was the rule settled in Missouri from which the statute was adopted.

State *ex rel.* Hudson v. Carr, 77 S. W. 544;
State v. Birch, 85 S. W. 363;
State *ex rel.* Flentge v. Burroughs, 174 Mo. 707;

See also

Centennial Eureka Mining Co. v. Jaub County (Utah), 62 Pac. 1024;
Chicago N. W. Ry. Co. v. Auditor General, 53 Mich. 79 (by Cooley, J.);
Summers v. Boyd, 48 Ohio St. 663;
Donnell Mfg. Co. v. Pawtucket, 75 Mass. 277;
Henshaw v. Bissell, 18 Wallace 271;
Powers v. Bowdle (N. D.), 54 N. W. 404, 21 L. R. A. 328;
City of Detroit v. Detroit City Ry. Co., 68 Fed. 166 (Taft, J.);
Bank of America v. Banks, 101 U. S. 140.

VI.

There is no merit in the contention made in the third assignment of error that the payment of the tax upon the personal property assessed and upon the original valuation as a basis for contesting the increased valuation in the original injunction suit and in the attempted

compromise, in any sense validated the action of the Board of Equalization for this proceeding, as these payments were in no sense an admission that the assessment was valid.

Arizona R. S. 1901, Par. 3900;
Same, Par. 3868.

It is fundamental, as declared in the Chicago Traction case, that one who contests as excessive a tax assessed against him must offer to pay what he does not claim is excessive.

VII.

There is no merit in the assignments of error warranting even their consideration on the question whether there was manifest error in this construction by a territorial court of a local statute.

This is clearly shown by the shifting position of appellant.

Baker v. Kaiser, 126 Fed., *l. c.* 319 (C. C. A., 8th Cir.);
N. Y. L. E. & W. R. R. v. Estill, 147 U. S. 591.

ARGUMENT.

I.

The "Manifest Error" Rule.

While this case was appealable to this court from the Supreme Court of Arizona, then a territory, the rule is settled by the repeated decisions of this court that in the exercise of this appellate jurisdiction, unless there is "manifest error," the Court will not disturb the decision of the territorial courts, particularly in the construction of revenue or other local statutes.

Thus, it was said in Idaho & Oregon Land Improvement Company v. Bradbury, 132 U. S. 509, that the necessary effect of the enactment of April 7, 1874, regulating the appellate jurisdiction of the court over judgments and decrees of the territorial courts, was that no judgment or decree of the highest court of a territory could be reviewed by this court in matter of fact, but only in matter of law. This is illustrated in this case by the findings of fact made by the Supreme Court of Arizona as a jurisdictional basis of this appeal. See *supra*, p. 8.

It was said in Fox v. Haarstick, 156 U. S. 679:

> "It is true that this ruling of the Supreme Court of the territory does not, even in a question of practice arising under the local law, preclude this court from reviewing as would a decision of a state Supreme Court in similar circumstances, but unless a **manifest error** be disclosed it should not feel disposed to disturb a decision of the Supreme Court of a territory construing a local statute."

In Copper Queen Min. Co. v. Arizona Board, 206 U. S. 474-477, this rule was affirmed in regard to a con-

tention between these same parties, and the construction of the Supreme Court of Arizona concerning the power of the territorial board of equalization was sustained, the Court saying that it would not disturb the decision of the Supreme Court of the territory construing a local statute unless "manifest error" appeared. In this case it appeared that the statute in question was taken almost *verbatim* from that of Colorado, just as in this case the statute construed was taken from Missouri, and the Court said that while it could not refuse to exercise its own judgment it naturally would lean toward the interpretation of a local statute adopted by the local court.

The same principle was followed in English v. Arizona, 214 U. S. 359.

This "manifest error" rule has been declared in a number of recent cases; thus, in Treat v. Grand Canon Ry. Co., 222 U. S. 449, relating also to the revenue laws of Arizona, and in Strauss v. Foxworth, at the present term, 34 Sup. Ct. Rep. 422, where, in an appeal concerning the revenue laws of the territory of New Mexico, the Court said there was no manifest wrong so as to justify the rejection of the local interpretation of the territorial statute. The same principle was announced in two other cases at the present term; thus, in Gila Valley G. & N. R. Co. v. Hall, 34 Sup. Ct. Rep., p. 229, also in Arizona case; and in Work v. United Globe Mines, 34 Sup. Ct. Rep. 274, also an Arizona case, where the Court concluded its opinion by saying:

> "Our sole purpose is to abstain from deciding a purely local question in the absence of these conditions which render it necessary for us to do so—that is, the existence of plain error of so serious a nature as to require correction at our hands."

Especially will this consideration be applied when the construction of the Territorial statute, deliberately established and followed, not only in the Territory, but in the State from which it is adopted, has been reaffirmed upon the eve of statehood.

Phoenix R. Co. v. Landis (U. S. Sup. Ct., Dec. 22, 1913).

Applying now this doctrine of the necessity of showing "manifest error" to the case at bar, we have the case of the Territorial District Court and Supreme Court concurring in the construction of a local revenue statute adopted from the State of Missouri concerning a statutory plenary proceeding for the enforcement of tax liens upon real estate. The Court held that there was a failure to show such a specific assessment of the specific property whereon the lien was sought to be foreclosed as would warrant the judicial enforcement of such lien.

While we are prepared to show that the ruling of the Court was in accord with the uniform decisions, both of Missouri and Arizona, we submit there is an utter failure of appellant to show by its assignments of error any basis whatever for this court even considering the correctness of the Court's construction of a local statute.

II.

The facts found by the Arizona court show that the tax was an intentional and arbitrary discrimination violative of due process of law and the equal protection of the law.

It is true that the judgment neither of the District Court nor the Supreme Court was based upon this ground, but this issue was made by the pleadings and the **facts found** by the Supreme Court as a jurisdictional basis of this appeal show that this contention of the defendant was **established** by the proof. The defendant in this case is not content with showing that under the "manifest error" rule there is really nothing for this Court to consider on this appeal, nor with further showing that the Arizona Court proceeded upon unassailable ground in holding that there was no valid assessment nor any basis for the enforcement of a statutory lien. They deem it their duty to go further, and to show the Court that they have invoked in good faith the protection of the Federal Constitution and the organic law of the territory, and that the tax sought to be enforced in this case was an arbitrary and intentional discrimination.

They therefore call attention at the outset to this question before considering the specific ground upon which the Arizona Court decided the case, as in the view of an appellate court the grounds of the decision are immaterial if the judgment is for the right party.

The learned Judge of the District Court of Arizona did not consider this question in his judgment as it was unnecessary for him to do so. His view of the case was stated by him at the close of the hearing as follows:

The Court said:

"The situation, as I analyze it, is this: The first question is, was there a valid assessment of this property. When that is determined, that is, if it is found that there was not a valid assessment on which a lien could be based, then the question must be determined whether the defendant by any act, or by any verified pleading filed in this cause or any prior cause, or by any statement given in to the assessor, or by any payment, has estopped itself in any manner from asserting the invalidity of this assessment. If the original assessment falls, and the defendant is not estopped in anywise, then it is plain that the raise must fall with the assessment. Until these questions are determined it will not be necessary to determine the questions of discrimination and fraud raised by the defendant in the last two paragraphs of its answer. If, however, the questions first referred to are determined in favor of the plaintiff, **then it will be necessary to determine the questions of fraud and discrimination raised by the defendant's answer.**"

The Findings of the Supreme Court of Arizona As To Discrimination.

The Arizona Supreme Court in its statement of facts, which is the jurisdictional basis of this appeal, specifically finds:

First. The tax list appeared upon its face to be verified by the oath of the superintendent of the mining company, but in fact was not so verified.

Second. A portion of the patented mining claims included in said list (of the sixty-five mining claims grouped in the assessment) are **not contiguous** to any of the others.

Third. The raise made by the County Board of Equalization in the assessment of the eight patented mining claims was not based upon any evidence as to the value of the claim so assessed and was **in fact arbitrary.**

Fourth. It was established by the uncontradicted evidence that certain of the patented mining claims which were thus assessed in value by the Board of Equalization were assessed **far in excess of their full cash value.**

Fifth. There were some 280 patented mining claims in Cochise county at the time this assessment in 1900 was made and they were and had been assessed at a uniform rate of $5.00 per acre. (The assessment sought to be enforced in this case was over $49.00 per acre!)

The Opinion in the Injunction Case.

Reference may be made at this point to the decision of the Arizona Supreme Court in the former case of County of Cochise v. Copper Queen Company, 71 Pac. 946. This was the injunction suit brought in 1901, already referred to, wherein the appellee tendered payment of the tax upon the original valuation, which was received by the county on account, but not in full. This court in its opinion in this case discussed the question of what facts a party was bound to allege and show to entitle him to equitable relief against discrimination in tax valuation, and referred to the dilemma which courts had found between the remedying of inequality on the one hand, and the disregard of the Constitutional and statutory requirements, that all property should be assessed at its full or cash value. In

other words, this court found the same difficulty which other courts have found in relieving the disproportionate valuation of a taxpayer's property when that property was itself undervalued, as compared with the full cash value required by the statute. It was conceded by the Court in its opinion that there was a difference of opinion in the courts of the country on that question, some taking "one horn of the dilemma," and denying relief where there was undervaluation, although there was a disproportionate undervaluation resulting in inequality, while other courts took the other horn of the dilemma and treated equality of taxation as the paramount consideration. Thus this court said a "**dilemma** was presented no matter what view of the law was taken," but it concluded to take the view that only the excess over the statutory requirement as to valuation should be regarded as constituting the wrong to be redressed. The Court therefore held that the findings of fact made by the District Court (see Rec. p. 135), that the action of the Board of Equalization was not based upon any information or evidence, but was taken arbitrarily and capriciously and for the purpose of imposing upon the plaintiff an unjust share of the "burden of taxation" was insufficient to sustain a decree that there should have been a finding whether in fact the patented mines were overvalued measured by the statutory rule of valuation. So judgment was reversed and the cause remanded for further hearing. As shown by the testimony, there was no further hearing, but the case was compromised under the authority assumed by the Board of Supervisors, and the action was dismissed.

This Court Has Since Taken the Other Horn of the Dilemma.

While the evidence in this case shows that the property of appellee, the mines, were overvalued, even according to the statutory standard of valuation, it is interesting to note that the Supreme Court of the United States has since this opinion in the injunction case, definitely taken the other horn of the dilemma, and has laid down the rule that whatever may be the statutory standard of valuation, **a party whose property is valued at a different rate and by a different method from that employed for others of the same class for the same year, resulting in enormous discrepancy and discrimination, is denied the due process of law and the equal protection of the laws protected by the United States' Constitution, Fourteenth Amendment, against impairment.**

This was the case of Raymond v. Chicago Union Traction Co., 207 U. S. 20, decided October 21, 1907. In that case the statute provided that valuation at the full cash value estimated at a price "which it would bring at a fair voluntary sale," and for a defined per cent of this value was taken as the assessed value. The Court held that an intentional discrimination against one or more corporations resulting in an unequal valuation as compared with others of the same class, was a denial of due process of law and equal protection of laws, although the property of complainant was also assessed below its full cash value. The Court affirmed the judgment of the court below, reported in 114 Fed. 557, in what are known as the celebrated Chicago Traction cases.

The Judge of the Circuit Court in this Chicago Trac-

tion case, which was affirmed by the Supreme Court, first ascertained the cash value of the property, then deducted 30 per cent so as to equalize the value with the assessment standard adopted throughout the State. The Court said in this case there was no evidence of fraud in the sense of corruption, but there was evidence of an intentional discrimination in valuation resulting in a substantial inequality in taxation, and that, it was said by both the Circuit and the Supreme Court, resulted in a denial of due process of law. The opinion of the Supreme Court in this case cited and followed the case of Cumings v. Merchants' National Bank, 101 U. S. 153, which was referred to by this Court in its opinion in the injunction case. The same view of the law was taken by the United States Court of Appeals upon the Eighth Circuit. (See Railroad Co. v. Republic County, 67 Fed. 411). By Justice Field on the Circuit in the California railroad case, 18 Fed. 385, and notably in an exhaustive opinion by Taft, J., then on the Circuit in the United States Court of Appeals, Seventh Circuit, in Taylor v. N. & L. R. R. Co., 88 Fed. 354, affirming 85 Fed. 302 and 86 Fed. 168.

We submit, therefore, that this Court has now taken the other horn of the dilemma, and that **equality, i. e., uniformity,** is the paramount test, and if the property of a taxpayer is intentionally, willfully overvalued, as compared with the uniform standard adopted in the case of other taxpayers of the same class, he is entitled to equitable relief, and to assert his equitable defense when the State attempts to enforce the tax lien against his property.

The Facts In This Case Undisputed Under Both Standards.

But under the facts found by the Court in this case, the distinction between the two horns of the dilemma, referred to by the Court in its opinion in the injunction case, becomes academic for the reason that it is established by the uncontroverted testimony and so found by the Arizona Supreme Court, as the basis of this appeal, that not only was the property of appellee overvalued as compared with the other patented mines, or rather with the uniform standard adopted for the other patented mines, but that as to some of the mines it was far in **excess of their full cash value at the time.**

It will be observed that paragraphs 20 and 21, presenting this issue of an unlawful and unconstitutional discrimination, are based upon the two horns of the dilemma which we have discussed. Paragraph 20 (Rec. p. 3) takes the horn of the dilemma taken by the Supreme Court in the Chicago Traction case cited, *supra*, and asserts that in view of the recognized uncertainty of determining the cash value of mining properties, the custom had been established in Cochise and other counties, of fixing the cash value of mining claims at a uniform rate of $5.00 per acre, and that this custom was not occasional, but **habitual**, and that a departure from this uniform rule of valuation by the Board of Equalization in the case of the mines of appellee was intentional and for the purpose of placing upon the defendant an unequal burden of taxation, compared with other owners of the same class of property. A comparison of this allegation of paragraph 20 with the rule of the Supreme Court in the Chicago Traction case, and in the same case by the Circuit Court, and in the ruling of Judge Taft in the Tennessee case, will

show that it is in exact conformity with what is declared in those cases to be a **wrongful and unconstitutional discrimination.**

These averments were established by the uncontroverted testimony not only of Mr. Douglas and of the Assessor, but the members of the Board of Equalization; and it is so found by the Arizona Supreme Court in its statement of facts.

Paragraph 21.

But paragraph 21 goes beyond paragraph 20 and makes exactly the averment which the Arizona Court declared in the injunction case, 71 Pac. 946, ought to be made in order to establish a case of actionable discrimination. Thus it is averred (see p. 5), "not only was this attempted increase unlawful and fraudulent, in that it was made for the purpose of discriminating against the defendant, and of making it bear an unequal burden of taxation as compared with residents of the county and owners of the same class of property, but it was also illegal and void in that the valuation thus placed **was in excess of the then cash value of said properties** and according to the standard fixed by the "laws of Arizona and was excessive and an overvaluation of said properties." This averment is in exact accordance with what this court declared in the Raymond case should be made; and the decree in the injunction case was reversed by the Arizona Court because these averments were not made therein. In this case they were not only made, but, according to the direct finding of the Supreme Court of Arizona, were **proved.** The difficulty, therefore, is not found in this case which is found in many where tax valuations are called in question, of proving allegations in regard to unlawful discrimination. Here the facts establish-

ing such discrimination are found by the Court to have been proved. It therefore follows that the allegations of the willful and intentional discrimination against the appellee are established as alleged and the increased assessment should therefore have been adjudged void as violative of due process of law and of the equal protection of the law.

The Fourteenth Amendment and Taxation Discrimination.

It is too well settled to need elaborate argument or citation that corporations are persons within the meaning of the Fourteenth Amendment, and therefore, entitled to the protection of that amendment relating to due process of law and the equal protection of the law in taxation and in tax procedure.

The point is so clear that this Court declined to hear argument upon it.

See Santa Clara County v. Pac. Ry., 118 U. S. 394.

This has been affirmed in many cases since that time. It is true that the protection of the amendment is extended specifically against State action, and Congress in the exercise of its power to organize and govern the Territories, combines Federal and State authority. But it is also true, as declared by this Court in the Mormon case, 136 U. S. 1, that Congress in legislating for the Territories would be subject to the fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, so this limitation would exist rather by inference, and the general spirit of the Constitution from which Congress derives all its powers than by any express or direct application of this provision.

The Organic Law of the Territory.

The fundamental protection afforded by the Fourteenth Amendment is in effect declared in the bill of rights of Arizona, which provides in Sec. 14 that no person shall be deprived of life, liberty or property without due process of law. The Revised Statutes of the United States, constituting the organic laws of the territory, specifically provides, Sec. 1851 R. S. U. S., that the legislative power of the territory extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.

> "But no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States, nor **shall the lands or other property of non-residents be taxed higher than the property of residents.**"

It is suggested that this inhibition extends only to the legislative power, but it is obvious that the only power tax officials can exercise is by virtue of legislation. If the Legislature cannot empower them to discriminate they certainly cannot discriminate in the exercise of the territorial power of taxation without any legislative authority.

In this connection it should be said that it was admitted that the appellee was a corporation organized under the laws of the State of New York, and was therefore a non-resident within the meaning of the organic law.

The So-called Equalization Void.

It therefore follows that under the facts specially found by the Arizona Supreme Court, the so-called equalization made by the Board of Supervisors of

Cochise County, which is the sole basis of the attempted recovery in this case, was not only an intentional discrimination against the appellee, placing upon it an unequal burden as compared with others in the same class, but was also violative of the Constitution of the United States and of the organic law of the Territory under the standard fixed by the Arizona Court in the former case, in that this valuation was in excess of the then cash value of the property.

It is therefore submitted that this attempted raise of the assessment was void and for that reason, irrespective of other questions, the judgment should be affirmed.

III.

The Defense of Unconstitutional Discrimination Properly Pleaded.

It was assumed by both the District Court and by the Supreme Court of Arizona that the defenses of unlawful discrimination were properly pleaded as a defense to this statutory action; and, as we have shown, the Supreme Court has specially included in its findings the facts showing this unlawful discrimination. The Court, however, found it unnecessary to consider this question as it gave judgment in favor of defendant upon other grounds.

Under the Arizona Code an equitable defense may always be interposed in an action at law.

Equity will always relieve against a tax founded on a fraudulent assessment. If the assessment is purposely made too high through prejudice or reckless disregard of duty in opposition to what must be necessarily the judgment of all competent persons, or through the adoption of a rule which is designed to operate unequally upon the class, and to violate the constitutional rule of uniformity, the case is a plain one for equitable relief.

Cooley on Taxation, Vol. 2, pp. 459-61.

This was in effect the holding of the Arizona Court in the case of County of Cochise v. Copper Queen Co., 71 Pac. 946. And the Missouri Supreme Court, construing this very statute before its enactment in Arizona in the case of State *ex rel.* v. Cunningham, 153 Mo. 642, 55 S. W. 249, in February, 1900, in a suit on a tax bill, quoted the language of Judge Cooley that the purpose of equalization was to bring the assess-

ment of different parts of a taxing district to the same relative standard, so that no one would bear a disproportionate part of the tax, and held that the defendant had a right to show that the board acted fraudulently and could plead facts entitling him to equitable relief against such fraudulent action of the board of equalization the same as if he had taken the initiative in a court of equity.

See also State *ex rel.* v. Merchants Bank, 160 Mo. 640; 61 S. W. 678.

There is no merit in the contention that appellee could have appealed from an excessive valuation to the District Court.

The matter of unjust discrimination set up in paragraphs 20 and 21 of defendant's answer and the facts found, not only by the Court on the hearing of the original injunction case, but also by the Supreme Court in its finding of facts in this case, to the effect that the increase by the Board of Equalization in the eight claims was not based upon any information or evidence had or obtained by them, and was taken arbitrarily and capriciously and for the purpose of imposing upon this appellee an unjust share of the burden of taxation, being a matter cognizable in equity, could not have been put in issue under an appeal from the action of the Board of Equalization as provided by Par. 3875 R. S. 1901. The only issue triable under said paragraph was the actual cash value of the property lawfully fixed by the Board of Equalization acting within its jurisdiction. The statute gives no authority to the District Court, under this section, to try the issue of fraud or the matter of insufficiency of description. This is left to a court of equity, and this question was

so determined in the Copper Queen case in 71 Pac. 946; and furthermore the whole question is set at rest in the case of Raymond v. Chicago Traction Company, 207 U. S. 20, where the court held that an intentional discrimination against one or more corporations resulting in an unequal valuation as compared with others of the same class, was a denial of due process of law and equal protection of the law, although the property of complainant was assessed below its full cash value.

In Atchison, Topeka & Santa Fe Ry. Co. v. Sullivan, 173 Fed. 456, this question is discussed at length by Judge Sanborn, of the Circuit Court of Appeals, Eighth Circuit, where Judge Sanborn, writing the opinion, says, page 461:

> "These facts leave no doubt that the taxing officers of Bent County adopted a rule pursuant to which they systematically and intentionally grossly under assessed the property of that county within their jurisdiction, with the legal intent unlawfully to diminish the burden of taxation upon property in that county other than railroad property; and to increase the burden upon the railroad property; and if this were the whole case, the complainant would be entitled to relief from the unlawful portion of this burden. A systematic and intentional under or over-assessment of one or more classes of property in violation of law, whereby one or more classes of property is to be made to bear an undue portion of the burden of taxation, presents a good cause of action for relief from the payment of the unjust part of the proposed tax."

This case came to the Circuit Court of Appeals from the State of Colorado, which state has a law in all par-

ticulars like that of section 3875, a part of which is commonly called the "Andrews Law." This statute in Colorado is found in the Laws of 1902, Extra Session, at pages 92 and 146. It provides for an appeal from the Board of Equalization to the District Court and requires prepayment of the tax as a condition precedent to the appeal, and also provides that where there is an over-valuation the sum unjustly collected shall be repaid to the taxpayer. Counsel for the defendant cited this statute and relied upon it, and Judge Sanborn, speaking of the matter at page 470 (173 Fed. 470), says:

> "Counsel cited the statute of Colorado, which provides that the Board of County Commissioners shall refund all taxes paid by any person which are afterwards found to be erroneous or illegal, and contend that the complainant has an adequate remedy by an action at law based upon this statute. Conceding, without deciding, that it might maintain such an action to recover back the illegal portion of the tax against its property, is that remedy as adequate as the injunction of the court below? The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt and efficient to attain the ends of justice as a remedy in equity. The facts and the law in this case have been ably presented to and carefully considered by two courts, and all the material issues in it have been determined. The complainant now has, and it is entitled to keep, the $3580 requisite to pay the illegal portion of its tax. An injunction in this suit will enable it to retain it and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this $3580 to the defendant, must bring, try and prosecute to judgment an action at law against the county to recover it back, must

possibly, it may be probably, come again to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for a *mandamus* to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. The proposed remedy is neither as prompt, nor as certain, nor as complete as the relief which may be granted through this suit in equity."

IV.

The decision of the Arizona Supreme Court that there was no basis in this case for the enforcement of the statutory tax lien upon real estate under the Arizona statute was clearly right and in accord with the prior construction of the statute.

Irrespective of the invalidity of the alleged increase upon the facts found by the Arizona Supreme Court as grossly discriminatory and arbitrary, it is also true that the Arizona Court proceeded upon unassailable ground in its holding that there was no basis in this case for the enforcement of the statutory tax lien. It must be borne in mind that the Arizona statute following that of Missouri makes no provision for a personal judgment against the owner on account of any taxes assessed against real estate. This case is not a proceeding against the defendant for a personal judgment on account of taxes. On the contrary the statute provides for a **lien** upon the specific property assessed and for the enforcement of that lien only by the sale of the specific lot or tract covered by the lien. As said by the Arizona Supreme Court in its opinion, "this Arizona statute was adopted from Missouri, and the prior con-

struction thereof by the Missouri courts was held to be controlling in Arizona." This procedure consists in the enforcement of the state's lien for taxes by ordinary civil action, the title of the owner and of all interested in the title being foreclosed by the plenary judicial proceeding in which every one interested in the title must be duly served by ordinary process if a resident or by publication as in other cases if a non-resident. This procedure seems to have been original in Missouri, where it was adopted in 1877, although some of its features may have been taken from the Texas statute adopted in 1873. Such a statutory suit for the delinquent taxes is directed solely against the property charged with the taxes and no personal judgment can be rendered against the owner although he is personally served with process nor is the judgment a lien against his other property; nor can any execution be issued except against the property charged with the tax. It was said by the Supreme Court of Missouri that a lien of a tax judgment is analogous to that of a mortgage foreclosure suit.

The statute under which this action is brought to enforce the state lien for taxes on specific property is the Arizona Back Tax law of 1901 (see 79 R. S. 1901 Ariz. as amended by acts of 1903, page 148) and is in substance the same as the Missouri Back Tax law originally enacted in 1877, the said act being carried into the Missouri revision of 1899 as sections 9302 to 9313. The Arizona Supreme Court found that this statute was adopted from Missouri and it was ruled that under excepted principles of construction the prior construction thereof by the Missouri Supreme Court was presumably adopted with the statute.

The Missouri Construction of the Statutory Procedure.

According to the repeated decisions of the Missouri courts, rendered prior to the adoption of this statute in Arizona, and constituting therefore the construction for Arizona, the procedure under this statute is solely for the collection of delinquent taxes on **real estate** and for the enforcement of the State's lien for the tax **upon each specific parcel of property,** and therefore requires a **specific original assessment of each parcel sufficiently definite for the enforcement of the State's lien thereon.** Any attempted grouping of parcels in the assessment renders it void, so far as the enforcement of this remedy is concerned.

We group below under appropriate heads the Missouri decisions under the various provisions of this statute.

The revenue laws provide separate and distinct remedies for the collection of taxes due upon personal property and taxes due upon real estate, and Act 92, which is copied verbatim from the laws of Missouri, has reference only to the collection of taxes due upon the latter.

That the revenue act of 1877 provides for no personal judgment against the owner but only for a judgment enforcing the tax lien against the **land.**

State *ex rel.* Rosenblatt v. Sargent, 76 Mo. 557.

There are two different methods provided by statute for the collection of taxes against real estate: One by suit to enforce the State's lien against the land; the other to distrain personal property for all taxes.

No personal judgment can be rendered against the taxpayer for taxes against his land, since such mode of collection is excluded by Rev. St. 1889, Pars. 7681-7684,

7608, providing for the collection of such taxes by a suit to enforce the state's lien against the land, or by distraining personal property for "all taxes."

State *ex rel.* Hayes v. Snyder, 41 S. W. 216, 139 Mo. 549.

The Assessor must list, assess and value each tract or lot of real estate separately for taxation, and an assessment and valuation of several separate tracts or lots in solido, is void, and any judgment based thereon, erroneous.

Under Missouri Sess. Acts 1877, p. 386, Par. 7, requiring each separate tract or lot to be charged with a lien, for the distinct amount of back taxes due thereon, a single judgment for the aggregate amount of charges, which aggregate was adjudged to be a lien upon all of the land collectively, was erroneous.

State *ex rel.* Rosenblatt v. Kerr, 8 Mo. App. 125.

Mo. Rev. St. 1879, Par. 6853, provides that each lot shall be chargeable with its own taxes, no matter who the owner is. Section 6838 declares that the judgment for back taxes shall describe the land on which the taxes are found to be due, together with the amount of tax and interest on each lot. In a suit for back taxes the judgment directed that each lot, or so much thereof as might be necessary, should be sold for its own taxes, interest and costs. The execution commanded a levy on the property described, or so much thereof, as might be necessary to pay the judgment, interest and costs. *Held*, that the execution could not be construed to authorize the Sheriff to sell only as many of the lots as should be necessary to pay the taxes on all of the lots, but merely authorized the Sheriff to sell only so

much of each lot as might be necessary to pay the taxes, interest and costs adjudged severally against the same.

State *ex rel.* Rosenblatt v. Sargent, 76 Mo. 557.

A decree, ordering the sale of land for back taxes, which enumerates the lots to be sold, making a separate finding as to taxes against each lot, and rendering a judgment against each lot separately, and ordering that the real estate, or so much thereof as may be necessary to satisfy the judgment, be sold according to law, does not mean that the sale must proceed only until any of the lot or lots had brought the amount of the entire tax upon all the lots, but is a separate judgment against each lot for its own burden of taxes within Rev. St. Par. 6836, which requires the judgment to state the amount of the taxes, etc., found to be due on each tract or lot.

State *ex rel.* Rosenblatt v. Sargeant, 12 Mo. App. 228.

Where an execution, issued on a judgment for back taxes on several lots, is special, and directs the sheriff to sell each for the amount adjudged to be due thereon, each stood charged for a separate and distinct amount, and one lot could not be made to pay any part of the amount due on the others.

State *ex rel.* Beckwith v. Finn, 100 Mo. 429; 13 S. W. 712.

Where several tracts of land are properly assessed separately, the sale of all in bulk for the total of all the taxes is invalid, being in contravention of Rev. St. 1889, Par. 7703, charging each tract with its own taxes.

Yeamans v. Lepp, 66 S. W. 957, 167 Mo. 61.

See State v. Illinois & St. L. Bridge Co., 8 Mo. App. 599, memorandum, *Id.*, 9 Mo. App. 571;
See also Brown v. Walker, 11 Mo. App. 232, affirmed in 85 Mo. 262.

Under Wag. St. Par. 216, providing that several tracts may be conveyed in one tax deed, but that each tract is chargeable only with its tax, such a deed is void if it does not set out that each tract was sold separately for the tax against it.

Allen v. Buckley, 94 Mo. 158, 7 S. W. 10.

The complaint shows that the assessment of appellee's several parcels of real estate is invalid for lack of proper description, and no valid judgment declaring a lien on each tract or lot of real estate, for the amount of taxes due thereon, can be rendered because thereof.

An assessment of land as "108.78 acres fr'l, section 17, township 33, range 14," seems hardly sufficient under the requirements of Rev. St. 1889, Par. 7555.

State *ex rel.* Kertsner v. Sanford, 127 Mo. 368, 30 S. W. 112.

A petition seeking to enforce a city tax lien against "part of inlot No. 331, on the plat of said city," is fatally defective in its description of the property.

City of Jefferson v. Whipple, 71 Mo. 519.

In another case the property to be charged was described in the assessment, tax bill and petition, as "all of lots 5, 6, 7, 8 and 9, block 28," lying outside of the right-of-way, W. K. Addition No. 1. Plaintiff's witnesses testified that the lots were all cut up by railroad tracks, but whose tracks they were he could not tell. *Held*, that defendant's objection to the admission of

any evidence to support the petition should have been sustained, since the assessment and tax bill were too uncertain.

State *ex rel.* Wyatt v. Wabash Railroad Company, 114 Mo. 1, 21 S. W. 26.

Rev. St. 1899, Par. 7555, requires the third column of the assessment book of the county assessor to contain an accurate description of the land, etc. Section 7552 provides that each assessment of real estate so made shall be made the basis of taxation on the same for two years next succeeding. *Held*, that a correct description of the land is essential to a valid assessment.

The fact that the **petition** in an action to enforce back taxes correctly describes the land does not validate or cure the defective description of the land in the back tax bill.

State *ex rel.* Flentge v. Burroughs, 74 S. W. 610; 174 Mo. 700.

A petition for the sale of land for taxes, with no other description of the property than "Tract 1, West End Add. Und. ½ int. in lots 73-74 and 75" in a certain county and state, is insufficient to support a judgment collaterally attacked.

O'Day v. McDaniel, 80 S. W. 895, 181 Mo. 529.

Under Wag. St. p. 1212, Par. 240, authorizing the use of initial letters to designate township, range, lot, block and the cardinal points of the compass, a tax deed describing the land as "N. W. N. E. N. U. R.," meaning a part of the N. W. quarter of the N. E. quarter north of Union Road in a certain section, is fatally

uncertain. And the description in a tax deed must conform to that contained in all anterior proceedings.

Lowe v. Ekey, 82 Mo. 286.

A tax deed describing the land conveyed as "two acres in the N. W. ¼ of section 6, township 49, range 33, the property of L." is fatally defective.

Western v. Flannagan, 120 Mo. 61, 25 S. W. 531.

A tax deed which describes the property as the "north forty-six and two-thirds feet of lots one to five," is void for uncertainty.

Roth v. Gabbert, 123 Mo. 21, 27 S. W. 528.

An assessment describing the land as .75 of an acre in a certain 40-acre tract is invalid for insufficiency of description, and where an assessment was invalid because not adequately describing the land assessed, the fact that the **petition** in a suit to enforce the lien for taxes correctly described the land did not validate the defective assessment and tax bill.

State *ex rel.* Ward v. Linney (Mo.), 90 S. W. 844.

If the Assessment Is Void, the Tax Is Void.

The assessment is the basis for the tax, and if the assessment is void it necessarily follows that the tax is also void.

City of Hannibal *ex rel.* Bassen v. Bowman, 98 Mo. App. 103, 71 S. W. 1122.

An assessment of lands for taxes founded upon an assessment which is invalid, a tax sale and deed based upon such invalid assessment are void.

Pike v. Martindale, 91 Mo. 268; 1 S. W. 858.

Though in a suit to collect a tax the tax bill is

prima facie evidence of its validity, it is not conclusive, and the defendant may show that it is not based upon a valid assessment.

State *ex rel.* Morris v. Cunningham, 55 S. W. 249, 153 Mo. 642.

A valid assessment is essential to a valid tax.

State *ex rel.* Ward v. Linney (Mo.), 90 S. W. 844.

The lists returned by the taxpayer to the Assessor are mere memoranda to enable the Assessor to discover and properly assess the property, and neither the tax payer or the Assessor are bound thereby.

The list of property, whether made by the taxpayer or the assessor, is a memorandum merely for the personal use of the assessor in making up the assessment book and is not evidence in a suit for the collection of taxes assessed.

State *ex rel.* Hudson v. Carr, 178 Mo. 229; 77 S. W. 543.

The assessment lists are mere preliminary memoranda for the assessor's use and not evidence in a suit for the collection of taxes, but the primary evidence is the tax book.

State *ex rel.* Musser v. Birch (Mo.), 85 S. W. 361.

Under Act 92 no personal judgment can be obtained, even though the defendant is served and appears, the action for collection of back taxes under said act being strictly a statutory proceeding in rem.

A judgment in a statutory proceeding for taxes is strictly *in rem*, not *in personam*.

Neenan v. City of St. Joseph, 28 S. W. 963, 126 Mo. 89.

The revenue act of 1877 provides for no personal judgment against owners for back taxes, but only for a judgment enforcing the tax lien against the land.

State *ex rel.* Rosenblatt v. Sargeant, 76 Mo. 557.

In suits for the collection of delinquent taxes against land there can be no personal judgment against the owner, even where there is a personal service.

Stewart v. Allison, 150 Mo. 343, 51 S. W. 712.

The taxpayer is not estopped to deny the validity of a tax by having tendered the amount supposed to be due.

A person is not estopped to deny the validity of a tax levy by having tendered the amount he supposed justly due.

State *ex rel.* Lane v. Hannibal & St. J. R. Co., 110 Mo. 265, 19 S. W. 816.

The assessment and collection of taxes can only be made as provided by statute.

An assessor can only proceed at the time and in the manner pointed out by statute, and to justify his assessment he must be able to show the statute that gives him the authority to make it.

City of Hannibal *ex rel.* Bassen v. Bowman, 98 Mo. App. 103, 71 S. W. 1122.

Arizona Decisions and Statutes.

The decisions under the Arizona statute are in harmony with the foregoing Missouri decisions.

That a separate assessment of each tract or lot of land is essential to a valid assessment in Arizona, is made manifest by reading the provisions of paragraph 3900, R. S. Ariz., 1901, which reads:

"Whenever any tax is paid to the tax collector, he shall mark the word 'paid' and the date of the payment in the duplicate assessment roll, opposite the name of the person or description of the property liable for such tax, and shall give a receipt therefor specifying the amount of the assessment, the amount of the tax, the amount paid, date of payment, description of the property assessed, **with sufficient certainty to identify it,** and the year for which the tax was assessed; but **no tax collector shall receive any taxes on real estate for any portion less than the least subdivision entered on the assessment roll.**"

This paragraph of the Arizona statute was adopted bodily from the general statutes of Nevada, Sec. 1096. It has been construed in the case of State v. Central Pac. Ry. Co., 25 Pac. 442, and again in Peers v. Reed, 48 Pac. 897, in which latter case the court says:

"The lands being separate and distinct parcels should have been valued and assessed separately. Not being so valued and assessed, the assessment under the authorities is void. In State v. C. P. R. R. Co., 21 Nev. 105, 25 Pac. 442, this court held that a taxpayer can, under our statute (Gen. Stat. Sec. 1096), pay the taxes upon some sub-divisions of his property entered upon the assessment roll, and not on all, and that it is the duty of the assessor to value each subdivision separately. Evidently the requirement that separate and distinct pieces of land shall be valued and assessed separately is for the benefit of the taxpayer. In Cooley on Taxation (page 280) the author says: 'When the two parcels are owned by the same person, if the statute requires a separate assessment, obedience to the requirement is essential to the validity of the proceeding.'"

The leading case from this Court on this subject, which is referred to by Judge Sloan in one of his decisions, is the case of French v. Edwards, 13 Wall. 506, 20 L. Ed. 702, being a tax case in which Justice Field rendered the opinion. The court in the French case says:

> "There are undoubtedly many statutory requisitions intended for the guide of the officers in the conduct of business devolved upon them which do not limit their power or render its exercise in disregard of the said requisitions ineffectual. Such generally are the regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory, but mandatory. They must be followed or the acts done will be invalid."

The reason of that rule is quite fully gone into with a full citation of authorities in the case of Frazier v. Prince, 58 Pac. 751 (Okla.).

In the case of Territory of Arizona *ex rel.* v. United Verde Copper Co., a *nisi prius* decision by Judge Sloan, rendered November 9, 1908, he says in his opinion filed:

> "The assessment is fatally defective as to certain items. Our statutes are certain and clear as to

the manner in which the real estate shall be assessed. It must be described in such a way as that a sale made in a suit to foreclose the lien for taxes will be effective to pass a good title. Improvements on each tract, though separately assessed, must be described with particularity, so that the tracts on which they appear may be definitely ascertained. (Paragraphs 3849, 3861, 3862, 3863 and 3884, R. S. See also French v. Edwards, 13 Wall. 511; Bird v. Benlisa, 142 U. S. 664.) In the assessment before us we find certain items manifestly improvements on real estate, and therefore presumptively real estate, set down among items of personal property. These are described as 'plants', 'buildings', 'company dwellings', 'Masonic Hall', 'hospital', 'new hotel'. No other description is given. Manifestly this attempted assessment violates in essential particulars of our revenue code and is void, and as no lien has attached no valid judgment can, under the law, be entered against the property thus inadequately described and assessed."

In a tax proceeding, which is strictly *in invitum*, the description ought to be as certain and definite as is required in judgments, grants and conveyances, otherwise it would be vague and insufficient. Paragraph 3249, R. S. Ariz., sets forth the minimum description by which a mining **claim** may be conveyed. It is as follows:

"(3249, Sec. 19.) In all actions, judgments, grants or conveyances it shall be a sufficient description of a mining claim if it can be intelligently learned therefrom the name of the claim, the district, county and territory where it is situate, and the book and page where the location notice thereof is recorded."

A description in a tax proceeding which does not measure up to this statute is certainly too indefinite to establish a tax lien.

Board of Equalization.

The description in the raise by the Board of Equalization is as indefinite and vague as the assessment.

By referring to pages 258-9 of the record (Folio 772-4), it will be seen that the Board of Equalization made the following order:

> "The Board being now fully advised in the premises finds it necessary to add to the assessed valuation of the property of said Company on the assessment roll as follows, to-wit:
>
> | | |
> |---|---|
> | Silver Spray Mine | $1,000,000 |
> | Hoisting works and improvements | 50,000 |
> | Holbrook Mine | 1,000,000 |
> | Hoisting and improvements thereon | 10,000 |
> | Connor Queen | 50,000 |
> | Copper Jack | 50,000 |
> | On buildings and other improvements | 50,000 |
> | Baxter Mine | 250,000 |
> | Atlanta Mine | 250,000 |
> | Dividend Mine | 350,000 |
> | Rucker Mine | 200,000" |

This alleged raise of the above patented mines by the Board of Equalization is just as defective, so far as the absence of a description is concerned, as the alleged original assessment. It falls exactly within the rule made in the cases which we have heretofore cited to the court. So, there are therefore two fatal objections to the petition of the complainant. The

first is that the Board of Equalization is only a **supervisory Board.** You can't raise unless you have something to raise from. If there is no valid assessment to start with there can be no valid raise made by the board; and, in the second place, the designation of the claims by their names by the said Board was just as vague and uncertain as the original assessment by the County Assessor. It will be noted that the original assessment of the 67 patented mining claims were made in bulk, or *en masse*, which appellant now contends was a legal and sufficient assessment. However, the raise by the Board of Equalization was a separate and distinct raise upon each of the several mines mentioned. The Board of Equalization treated the respective mining claims as separate and distinct lots, parcels and tracts of land, and attempted to make the raise accordingly, without having before it any separate or distinct assessments of the several mining claims to which it might add the proposed raise. Counsel in their brief in the Arizona Court at page 32 say:

> "We are only contending for the tax upon the eight claims which were raised, and about which there are no omissions, insertions or misdescriptions."

Counsel are in error in this. In the first place, these descriptions are as vague and uncertain as those contained in the original assessment. In the second place, the raise by the Board includes the "Dividend," but the complaint contains no claim by the name of "Dividend," and there is no such mine or claim in the district known as the "Dividend," or the "Dividend Wedge." (See Record, Folio 1135.)

It seems apparent if the mining claims were properly assessed *en masse*, the raise by the Board of Equalization should have been *en masse*. This is undoubtedly the position which counsel for complainant took when they prepared their complaint, for it is therein alleged:

> "That on said 17th day of July, 1901, said Copper Queen Consolidated Mining Company appeared before said Board of Equalization, and upon the hearing and consideration of said matter said Board determined to and did change and correct the valuation of said property of said Copper Queen Mining Company in said assessment roll as returned by said assessor, by adding thereto as follows:
>
> "To the valuation of patented mines and improvements, $3,260,000."

Upon the introduction of the various exhibits showing said separate raises on said mining claims, the appellee objected on the ground that the same was a variance between the allegations of the complaint and the exhibits offered. (See Rec., Folios 827-8.)

It necessarily follows from the foregoing, and from the statutes of the Territory conferring on boards of supervisors their powers to equalize taxes that they can only act upon **valid original assessments,** raising or lowering the same. Such a board cannot make an original assessment, as it is only a **supervisory board.**

> See Territory of Arizona *ex rel.* v. Gaines, 93 Pac. 281.

Decisions in other States.

Not only is the assessment in this case void, because of the defective description, under the statutes

and decisions of the courts of Arizona and Missouri, but it would be held to be insufficient and void under the decisions of the appellate courts of all the States whose statutes provide for a tax lien **only upon the specific property assessed,** and for the enforcement of that lien only by a **sale of that specific property,** even though the description might be sufficient to support a personal judgment against the owner, or to sustain a **general lien** on all the property of the owner, in States where those remedies are given.

Black on Tax Titles, Sec. 112, p. 143;
Powers v. Bowdle, 21 L. R. A. 328, 54 N. W. 404 (North Dakota);
Green v. Lunt, 58 Me. 518;
I Desty on Taxation, 564 and 573;
Bidwell v. Webb, 88 Am. Dec. 56 (10 Minn. 82);
Thibodaux v. Keller, 29 La. Ann. 508;
Morristown v. King, 79 Tenn. 669;
Pfeiffer v. Miles, 48 N. J. Law 450;
Evans v. Newell, 18 R. I. 38;
Grisson v. Furman, 22 Fla. 581;
Dingey v. Paxton, 60 Miss. 1038;
People v. Reat, 107 Ills. 581;
Keane v. Cannovan, 21 Calif. 302;
People v. Mahoney, 55 Calif. 286;
Hayden v. Foster, 13 Pick, 492.

Thus Black on Tax Titles, Sect. 112 (p. 143), says:

"But here it is to be noted that although, if the description is fatally defective, **the lien of the tax will not attach to the land,** it does not follow that the tax cannot be collected. On the contrary, **if the tax is a personal charge against the owner,** his liability to pay it **will not be affected by the escape of the land itself** through the imperfection of the description."

1 Desty on Taxation, p. 573, says:

> "Where lands are separated either by the use or purpose to which they are devoted, or by the mode of occupation, or are disconnected in location, a tax laid generally upon an entire valuation cannot be made **a lien upon each separate parcel**, even when owned or occupied by the same person."

And on page 564 he says:

> "The tax list must show with certainty what the property taxed is. The description **must be certain of itself, and not such as to require evidence aliunde to render it certain.**"

In the case of Hayden v. Foster, 13 Pick. 492, the decision is by Chief Justice Shaw, and is probably the leading case on this subject, holding, as it does, that statutes requiring the separate assessment of different lots or tracts of real estate, are mandatory.

In Green v. Lunt, 58 Maine 518, the court (per Danforth, Judge) says:

> "The R. S. (Sect. 150) provide that 'for all taxes legally assessed on real estate belonging to resident proprietors * * * a lien is hereby created which shall continue in full force until the payment thereof.' By the same section it is further provided that the collector may give notice of his intention to sell so much of said real estate as is necessary to pay said tax and charges. The collector has no authority for selling land for taxes except as given in these statutes. He can sell, such and only such as the law gives him a lien upon, and the lien attaches to such, and only such as are legally assessed, and to the specific and definite parcel upon which the tax is laid. If

there is no definite parcel taxed, there can be no lien, and if no lien there can be no legal sale. Hence the inference is irresistible, that, in the assessment which establishes the lien, and which is the foundation on which rests all subsequent proceedings, the lots **taxed must be definitely and distinctly described.** * * * **The assessment must be complete in and of itself,** as much so as a deed or contract. Parol proof may be resorted to for the purpose of applying the description contained in the assessment to the face of the earth, but no further. It cannot supply any deficiency in the buts or bounds. These must be ascertained from what is written and from that alone.

"We suppose, as contended in the argument, that the assessor intended to assess the lot or portions of the lot owned by the person taxed, or we may learn that fact from those **officers** themselves. But this is not a question of **intention, but one of fact.** What did they do? What is the specific lot upon which the tax is made? Until we can answer these questions, and from the record, we are utterly unable to ascertain the lot to which the lien attaches, and the one to be sold."

This opinion of Judge Danforth was concurred in by Justice Kent, and all of the other judges of the Supreme Court of Maine.

In the case of Keane v. Cannovan, 21 Calif., *l. c.* 299, Mr. Justice Field, then on the Supreme Court of California, in the opinion in that case, which was a proceeding to enforce a tax by the sale of the specific property assessed, used the following language in holding proceedings for the sale of the land for taxes void for uncertainty of description:

"The description must be certain of itself, and

not such as to require evidence *aliunde* to render it certain. The statute requires the collector, in his publication of the delinquent list, to give such a condensed description of the property that it may be easily known. A description which cannot be made intelligible without resort to extrinsic evidence is not of this kind. Certainty in the description is required to apprise the owner that his property is advertised for sale, and to enable him to prevent the sale by paying the taxes thereon, and to impart information to the bidder as to the actual extent and location of the premises to be sold. All subsequent proceedings depend upon this certainty. An inaccurate or uncertain description defeats every step subsequently taken, and as we have already said, the uncertainty cannot be cured by evidence *aliunde*. A description, says Blackwell, 'sufficiently clear to convey land between man and man, and which, if contained in an agreement to convey, would authorize a court of equity to decree specific performance, will **not answer in proceedings to enforce the collection of a tax.**' "

In People v. Mahoney, 55 Cal. 286 (cited by Appellant), Justice Ross says:

"A description sufficiently certain to convey land between man and man, which, if contained in an agreement to convey, would authorize a court of equity to decree a specific execution, may not answer in a proceeding to invest the collection of a tax. In the latter case the description must be certain of itself, and not such as to require evidence *aliunde* to render it certain."

In Pfeiffer v. Miles, 48 N. J. Law 450, the court said:

"The supplement of 1873, making all real estate salable for taxes, and prescribing the extent and

limit of the lien of taxes on real estate, and the mode of enforcing the same in townships contains no directions for a description of the real estate in all cases. While doubtless such a description ought, out of caution, to be given, and is **absolutely essential to the lien of the tax,** I am unable to discover that its absence will invalidate the tax or exonerate the owner from being compelled to pay the **tax by such proceedings as can be resorted to without a lien.**"

In Thibodaux v. Keller, 29 La. Ann. 508, it was held that a **tax sale** of property (in a proceeding under the Louisiana statutes to **sell the specific property** for the taxes assessed against it), was void if the **assessment** or the advertisement under which the sale was made contained no description of the property sufficiently specific to clearly identify it. That in such case the assessment stands in lieu of a judgment. It is the foundation of that which follows and must contain an accurate and sufficient description of the property, as required by the statute.

This Court has also held that vagueness of description in an assessment renders it and all subsequent proceedings thereunder absolutely null and void. Thus, in the case of Bird v. Benlisa, 142 U. S. 664, 35 Lawyers' Ed. 1151, it held an assessment void for uncertainty, which described land as follows:

Owner.	Des. of Land	Sec.	Town.	Range.	Acres.	Amount.
Mazell, Partin & Partin.	Alexander. Spring Creek Grant.	..	..	..	7,800	$1,822

It also held that inasmuch as the original assessment was void, all subsequent proceedings based thereon must necessarily be void, even though the land was cor-

rectly and fully described in such subsequent proceedings.

Text-writers have assigned the following reasons for the foregoing decisions:

> "The purpose in requiring accurate descriptions is threefold: (1) To inform the owner what property is to be sold; (2) That intending purchasers may identify it; (3) That a proper deed may be made to the vendee on the sale."
>
> Black on Tax Titles, p. 112;
> Cooley on Taxation, p. 742.

Black also quotes with approval the language of Danforth, Judge, as follows:

> "The collector can sell such and only such lands as the law gives a lien upon; and the lien attaches to such, and such only, as are legally assessed, and to the specific and definite parcel upon which the tax is laid. If there is no definite parcel taxed there can be no lien, and if no lien there can be no legal sale."
>
> Black on Tax Titles, Sec. 112;
> Danforth, Judge, in Green v. Lunt, 58 Me. 518.

In this section 112 Black also points out the distinction between a description sufficient to support a judgment against the owner and one which is sufficient to authorize a **lien upon the parcel of land assessed.**

Black, Sec. 112, p. 143.

Black points out that if the owner has returned the property, any description which he himself has given, or from which he can understand what is assessed, is sufficient **to uphold a judgment against the owner,** although it is insufficient to **create a lien against the lot attempted to be assessed.**

We have cited these decisions showing that the **assessment** in this case and *a fortiori* the **increased** assessment would be held insufficient and void in states other than Arizona and Missouri where a tax lien is sought to be enforced upon specific property assessed even though the description in the assessment might be sufficient to support a personal judgment against the owner. This distinction is fundamental. These rulings are therefore peculiarly appropriate in the present case where the proceeding is directed only against the specific property for the establishment of a specific lien. It was not a question of mere clerical error in misdescription, as counsel seem to assume in their assignment of errors, nor was it a question of merely variance between the assessment roll and the other papers, but the defect was fundamental in that the assessment was made in bulk of sixty-five different properties which were **not contiguous**, some being more than a mile apart, and it is attempted to shift from an assessment in bulk by segregating certain specific property, and raising same, when there was no specific assessment upon such parcels. We submit that the attempt to enforce a statutory lien upon specific property in such a case would be a travesty upon the whole theory of this proceeding for the enforcement of tax liens. We submit therefore that the judgment of the trial court and Supreme Court of Arizona based upon that construction of the state statute rests upon unassailable grounds.

V.

There was no estoppel in the original assessment which can be availed of in this proceeding against the appellee.

In the first place, an estoppel, in order to be availed of, must be specially pleaded.

8th Ency. Pl. & Pr., p. 7 and cit.

The complainant has not pleaded estoppel in this case, nor facts constituting an estoppel, and had the matter been plead, the act of the appellee in handing to the assessor a memorandum of its property was to aid the assessor in discovering the same and entering it upon the assessment roll by its proper description.

State *ex rel.* Hudson v. Carr, 77 S. W. 544.

The list of schedule prepared by the taxpayer is a mere memorandum and under our statute in an action to foreclose a tax lien, the same is not evidence.

State v. Birch, 85 S. W. 363.

This matter came squarely before the Court upon our statute as construed by the Supreme Court of Missouri in the case of State *ex rel.* Flentge v. Burrough, 174 Mo. 707, 74 S. W. 612.

The Court says:

> "But the record discloses that the defendant Frank E. Burrough, husband of his co-defendant, furnished the assessor lists of their property in which the land in question was described as in the tax bill (Note:—It will be observed in the case at bar the same was not described as in the tax bill); and it is insisted by plaintiff that by reason of this fact they are estopped to object to the sufficiency of that description, and cannot dispute the

validity of the assessment, nor defeat the collection of the taxes. That defendants might be estopped from denying the ownership of the land described in the tax bill, by reason of the fact that they furnished a list of their property, including the land in question, in which it was described as in the tax bill, under certain circumstances, is doubtless true, but that they are not estopped in this proceeding by reason of that fact from denying that the **description** of the land in the tax bill is too vague and uncertain upon which to base a judgment and enforce a lien against the land for taxes, is equally clear. They could not in this proceeding supply by anything they may have said or done, that which was essential to a good and valid assessment, that is, an accurate description of the land for the want of which the assessment and the tax bill are void."

Centennial Eureka Mining Co. v. Jaub County (Utah), 62 Pac. 1024, is a leading case upon the subject and goes very fully into the doctrine of estoppel in a tax proceeding, stating the rule to be that a party estopped must have, first, falsely represented or concealed a material fact; second, the false representation or the concealment must have been fraudulently made; third, the party pleading the estoppel must have been ignorant of the fact; fourth, the representation must have been with the intention that it should have been acted upon; fifth, the party pleading it must have been misled thereby. The Court says:

"Tested by the foregoing requirements, the facts in the case at bar do not constitute an estoppel. The plaintiff was not found guilty of a deception, made no misstatement and perpetrated no fraud, but simply did what he was required to do

by the assessor. As the assessor, collector and treasurer are presumed to know the extent of their authority, the statement could not mislead them."

See also Chicago N. W. Ry. Co. v. Auditor Gen., 53 Mich. 79.

The opinion in the case just cited was by Judge Cooley, in which he says:

"One is estopped from denying the truth of his own statement if his denial would mislead and prejudice another who acted in reliance thereon, but the State in collecting its revenue cannot apply the rule of estoppel to citizens who have not fully reported the necessary data for assessing them, unless the citizens are acting in fraud and evasion of the law."

See Somers v. Boyd, 48 Ohio St. 663;
Donnell Mfg. Co. v. Pawtucket, 75 Mass. 277;
Kenshaw v. Bissell, 18 Wal. 271.

In the case of Powers v. Bowdle, 54 N. W. 404, 21 L. R. A. 328 (N. Dakota), it was held that where State statutes provide that a tax shall be a lien upon the property against which it is assessed, which may be foreclosed by a sale of the specific property, and where a description in an assessment was uncertain and fatally, defective in not describing each specific parcel distinctly, it could not be rendered valid and sufficient by showing that it corresponded with a description furnished the assessor by the owner. That **the public** and bidders at tax sales, as well as the owners, are interested in the description of real estate in the tax **records and tax titles.**

The doctrine of estoppel is not applicable in a proceeding of this kind *in rem* to enforce a tax lien against a specific lot or tract of land. If the tax was a per-

sonal debt, and the proceedings were to obtain a personal judgment, it might be different, for estoppel acts upon and deals with **persons** only, and not things. The doctrine of estoppel when applied seals the lips of persons, but as inanimate objects have no lips the doctrine may not be invoked to change the status of the thing against which the proceeding *in rem* is had. The doctrine is said to create a contract against a person by implication. The doctrine is entirely one of implication, and surely a tax lien may not be created by implication or estoppel *in pais*. A tax lien may only be created by the assessor, acting strictly within his statutory authority. This is done by the assessor entering upon the assessment roll a sufficient description of the lot or tract of land assessed, and carrying out upon the assessment roll the specific amount of tax due against such lot or tract of land. The assessor is guided by, and his duty and authority is prescribed by the statute. He takes his direction solely from the statute. He is presumed to know the extent of his authority, and as against this statutory authority could not have been misled. It will be conceded, of course, that a taxpayer himself has no power to make an assessment or create a tax lien, and it is elementary that where a person has no **power** to do an act, that act or thing may not be done by implication or created by estoppel against such person. There can be no estoppel where there is no power to act. This doctrine is succinctly set out by Judge Taft in the case of City of Detroit v. Detroit City Ry. Co. (60 F. R. at page 166), in which he says:

> "The general rule is where an express mode of creating a liability against such a corporation is prescribed by the statutes, no liability can be en-

> forced and no estoppel can be raised against it on the ground of the acceptance of benefits or other conduct which would render an individual liable. The reason is that the mode of contracting prescribed, limits the power of contracting, and no implication or estoppel from circumstances can supply the want of power."

And again in Bank of America v. Banks (101 U. S. 240) the Court says:

> "In order to work an estoppel, the parties to a deed must be *sui juris* in their own right competent to make it effectual as a contract; hence, a married woman is not estopped by her covenants. Plainly the wife was not competent to purchase supplies for the plantation of the husband, and therefore cannot be estopped by these recitals."

Therefore, inasmuch as Mr. Walter Douglas, general manager of the appellee company, had no power to make a tax assessment or create a tax lien, and was not competent *sui juris* to make a tax lien effectual as a tax lien, there could be no estoppel by the return of the list. Mr. Douglas cannot supply in this proceeding, by anything he may have said or done, that which was essential to a good and valid assessment, viz, a separate and accurate description of the land by the assessor. It is claimed by the appellee that the assessment is void for insufficiency of description and because said assessments was made *en masse*. The appellant replies that, though the assessment may be void upon its face, the invalidity is cured by implication or estoppel. Let us examine this proposition. For instance: In this case, suppose the appellee had handed in a correct list of his property, fully describ-

ing it separately, and the assessor had utterly failed to enter the same upon the assessment roll (which status would then be in nowise different than a void assessment), could any one contend that there was an assessment and tax lien and then bring suit to enforce such, contending that by virtue of the fact of delivering such list to the assessor created by estoppel an assessment and a tax lien and cured the delinquency of the assessor himself? Surely not. On the other hand, supposing that the appellee had given in a list of mining claims by the names of "George Washington," "Patrick Henry," "Benjamin Franklin," etc., containing 636 acres, and no such mining claims in fact existed, and the assessor entered such names of mining claims on the assessment roll. Would the fact that the appellee handed in such list create by estoppel or implication a specific lien on any real property whatsoever? Surely not. The only way a lien may be created is by the act of the assessor, describing the property so that it may be identified **thereby**—from the description itself—and then carrying upon the assessment roll the specific amount of tax which is assessed against such separate tract of land, and anything that a taxpayer may have said or may not have said cannot add to nor detract from the duty of the assessor nor create a tax lien.

This was exactly what the Supreme Court of Missouri said in the case of State *ex rel.* Flentge v. Burrough (74 S. W. 612) in an action for back taxes under this very statute (*supra*, p. 84).

VI.

There is no merit in the contention made in the third assignment of error that the payment of the tax upon the personal property and upon the original valuation as a basis for contesting the increased valuation and in the attempted compromise rendered harmless the errors and omissions in the tax list and in transcribing the same from the list to books and from the books to the complaint and these payments were in no sense an admission that the original assessment was valid.

Appellant alleges in his complaint in paragraph 12 that on the 9th day of September, 1901, said Copper Queen Consolidated Mining Company paid to the tax collector on account of said taxes, in partial payment thereof, the sum of $14,133.12; and this allegation is borne out by all the evidence in the case, as is evidenced by the receipt given by the tax collector to appellee. Abs. of Rec., pp. 423-424, folios 1267-1269, where it is recited:

> "Which said amount of Fourteen Thousand One Hundred Thirty-three Dollars and Twelve Cents said company concedes to be due, and which is accepted by the county treasurer and *ex officio* tax collector on account of any moneys which may ultimately be determined as due from said company for said taxes for said year."

Said amount is entered on the duplicate assessment roll as follows: "14,133.12 paid on account;" Plaintiff's Exhibit F, the delinquent tax roll, where said amount is entered as follows: "December 9th, 1901, $14,133.12 pd. on account;" Plaintiff's Exhibit G, back tax book, where said amount is entered as follows:

"December 9th, 1901, pd. on acc't $14,133.12;" and on the back tax bill, Plaintiff's Exhibit A, the amount is entered, "Amount paid on account."

Furthermore, there is no statute by virtue of which the tax collector could have received the amount of $14,133.12 as a full payment and discharge of the tax upon the original assessment. Not only is there no statute authorizing the tax collector to receive payment, but the provisions of paragraph 3900, R. S. Ariz. 1901, expressly prohibit it. The statute is as follows:

> "3900. (Sec. 70.) Whenever any tax is paid to the collector he shall mark the word 'paid' and the date of the payment in the duplicate assessment roll opposite the name of the person or description of the property liable for such tax, and shall give a receipt therefor, specifying the amount of the assessment, the amount of the tax, the amount paid, the date of payment, description of the property assessed with sufficient certainty to identify it, and the year for which the tax was assessed; but **no tax collector shall receive any taxes on real estate for any portion less than the least subdivision entered on the assessment roll.**"

It is, therefore, shown that all that the tax collector could do would be to receive the amount tendered as a deposit or on account.

The tax lien comes into life and attaches when the assessment is entered upon the roll by the assessor; and when the Board of Equalization makes a legal raise in an assessment such raise becomes at once amalgamated and merged with the original assessment. The assessment as originally assessed by the assessor, is not a separate and distinct tax or item, after the raise, which may be segregated, dealt with, and treated

in the tax proceedings—or **paid**—as a distinct entity. There can be no two taxes and two liens, one for the original assessment, and one for the raise made by the Board of Equalization; but the tax lien for the amount of the raise depends upon and relates back to the original assessment, and has its life and virtue by reason of, and only by reason of, the **existence** of the original assessment of which it becomes a part and with which it becomes inseparably blended. The raise in an assessment draws its vitality and the only vitality it has as a tax lien because of its merger with and relation to the original existing assessment. If appellant's contention were sustained, and it should be held that the original assessment was a separate and distinct tax which could be dealt with as such in the tax proceedings and fully paid, discharged and wiped off the tax rolls, there would be nothing to which the raise could attach itself and relate back—nothing from which it could draw its life as a tax lien. The original assessment is like the leaven—it leaveneth the whole.

It follows, therefore, that under the statute, Sec. 3868, as construed by this Court in the injunction suit, the powers of the board are only supervisory. They are simply to raise or lower an existing assessment. If there is no assessment to act upon, their action is necessarily void. This was declared in the very *mandamus* suit which directed this suit to be brought. No one can assess but the assessor.

The Payment Required Under the Rules of Equity Procedure.

We came into court and sought to enjoin the raise as an illegal discrimination, and, in the course of that proceeding, tendered the original tax which we con-

ceded was just. This tender was made under the general rule of equity which was declared by the Supreme Court of the United States in the Chicago Traction case, hereafter referred to, that a man who contests a tax assessed against him as excessive must offer to pay what he does not think is excessive. This duty does not rest upon any statute, but upon the recognized principles of equity based upon considerations of public policy. The defendant, therefore, offered to pay, but he offered it only as a payment in full. It has said, we offer this now as a payment in full of all we owe. The county said, on the other hand, we will not accept this as a payment in full, but we will take it on account. Now, to say that this payment constituted an estoppel against the company from contesting this very increase which we went into a court of equity to contest would be a travesty upon equity.

VII.

There is no merit in the assignments of error warranting even their consideration on the question whether there was manifest error in this construction by a Territorial court of a local statute.

No better illustration could be afforded of the utter lack of even plausible merit in the contentions of appellant than the shifting position which counsel have been compelled to take in the assertion of this anomalous claim. We quote from the opinion of the Supreme Court, *supra*, page 35:

> "The prayer of the complaint was originally for a foreclosure of the alleged lien against the tract of sixty-five claims as an entirety. By leave of the (trial) Court subsequent to the admission of the evidence under consideration (of the raise upon the eighth claims) the prayer was amended to read, 'That the said judgment and the whole thereof be adjudged and decreed to be the first and paramount lien upon such of the above described lots, tracts and parcels of land and real estate as the Court may from the proof adjudge to be subject to a lien for said taxes in favor of the Territory of Arizona'. There was, however, no amendment of the allegations of fact upon which relief was sought."

After the judgment was rendered by the Supreme Court of Arizona the position of appellant was again shifted, as set forth in the motion for rehearing, filed as part of their brief in this case. Thus, it is said, page 23:

> "While the decision of the Court **compels us to take different ground respecting the effect of the**

raise than we have heretofore held, we are convinced by the Court's reasoning that the Board could not lawfully segregate these eight claims from the mass and raise the valuation of them separately, there having been no separate assessment."

Counsel thereupon proceeds to argue that while there could be no segregation, the raise of the value of a part was necessarily a raise of the value of the whole. As to this extraordinary contention, we can say, in the first place, that it was made for the first time when, as counsel concedes, they were convinced by the reasoning of the opinion of the Supreme Court of Arizona, and in an essentially different position from that which was the contention in the trial court and in the argument before the Supreme Court of Arizona. Such a shifting of ground is not only in violation of the settled rules of orderly appellate procedure, but is the strongest possible evidence of the lack of merit in the claim of appellant.

See Baker v. Kaiser, 126 Fed., *l. c.* 319 (C. C. A., 8th Cir.);
N. Y. L. E. & W. R. W. v. Estill, 147 U. S. 591.

But, furthermore, this new position of appellant ignores the essential basis of the decision of the Arizona court, when it said that the group assessment in this case might be sustained as against the company, and that possibly a raise of the group would be sustained. The raise was not upon the **group**, but upon **segregated parcels of the group**, and the Court said expressly that such an assessment could only be validated as a personal claim, and not as a basis for a foreclosure

preceeding depending upon the specific assessment of each parcel against which a lien is asserted.

The assignments of error have been sufficiently discussed. We have carefully examined all of the cases cited, and we find none of them that afford the remotest analogy to the facts of the case at bar. We submit, therefore, that so far from the case showing the "manifest error" which is necessary for a reversal of the judgment of a Territorial court on a non-Federal question, an examination of the record shows beyond any question that not only was the judgment of the Court sound in its construction of the local statute, but the facts found by the lower court also establish beyond question that the claim sought to be enforced was violative of fundamental constitutional guaranties invoked by appellee.

We submit the judgment should be affirmed.

Respectfully submitted,

FREDERICK N. JUDSON,
JOHN F. GREEN,
E. E. ELLENWOOD.

In this case *held* that payments of taxes made under an attempted compromise agreement did not operate to estop the taxpayer from contesting the legality of the action of the taxing authorities in increasing the assessments on the property.

In this case this court affirms the judgment of the Supreme Court of the Territory of Arizona that the Board of Equalization had no power under the statute of the Territory to raise the separate assessed valuation of certain mining claims of groups which had originally been assessed *en masse*.

13 Arizona, 198, affirmed.

THE facts, which involve the construction of the statutes of Arizona regarding valuation assessments for taxation, are stated in the opinion.

Mr. Elias S. Clark and *Mr. George P. Bullard*, Attorney General of Arizona, with whom *Mr. William G. Gilmore* and *Mr. William C. Prentiss* were on the brief, for appellant.

Mr. Frederick N. Judson, with whom *Mr. E. E. Ellinwood* and *Mr. John F. Green* were on the brief, for appellee.

MR. JUSTICE DAY delivered the opinion of the court.

This was a special statutory proceeding (Laws of Territory of Arizona, 1903, Act No. 92, p. 148) brought in the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise to enforce the lien of the Territory for the payment of taxes for the year 1901 assessed against certain patented mining claims in the County of Cochise, amounting to $120,039.35, the tax being assessed upon the increased valuation of the mining claims of the Company made by the Board of Supervisors of Cochise County. In the trial court judgment was rendered for the defendant. Upon appeal to the Supreme Court of the Territory of Arizona the judgment was affirmed (13 Arizona, 198). An appeal was prosecuted to this court under the statute regulating appeals from territorial courts (18 Stat. 27).

The Supreme Court of the Territory of Arizona made a statement of facts in the nature of a special verdict, and upon that finding this court must consider the case on this appeal. *Eagle Mining Co.* v. *Hamilton*, 218 U. S. 513, 515; *Zeckendorf* v. *Steinfeld*, 225 U. S. 445, 449. From the facts thus found the following appears:

The appellee, a corporation doing business and owning real and personal property in Cochise County, Arizona, listed and returned for assessment in 1901 sixty-five mining claims belonging to it, by name, but as one tract, said to contain 636 acres and valued at $3,180, with improvements valued at $55,431.76. Some of the claims are not contiguous to the others.

On July 17, 1901, the County Board of Supervisors, sitting as the Board of Equalization for Cochise County, after notice to the Company and hearing at which appellee's superintendent and agent appeared, raised the assessment upon eight of the sixty-five claims originally assessed *en masse*, in amounts varying from $50,000 to $1,000,000.

Prior to September, 1901, the appellee brought suit in the District Court of Cochise County to enjoin the collection of the tax, alleging that the increase had been fraudulently made and the property overvalued. It tendered the sum of $14,133.12, being the amount of the tax upon all of its property before the increase. The District Court found that the increase was not based upon information or evidence but was made arbitrarily and capriciously for the purpose of imposing an unjust share of the burden of taxation upon the appellee, and granted the injunction, upon condition, however, that the appellee pay the $14,133.12 into court and also the further sum of $9,589.20, the tax upon the increase in valuation of certain personal property, which the District Court found to be valid. The $14,133.12 was accepted by the County Treasurer, who was *ex officio* tax collector, "on account of any

moneys which might ultimately be determined as due from said company for its taxes for said year." The Supreme Court, upon appeal, reversed the case and remanded it for new trial (*County of Cochise* v. *Copper Queen Co.*, 8 Arizona, 221). Subsequently, an agreement of compromise was made, under authority of a resolution of the Board of Supervisors, the appellee paying the further sum of $5,661.44 in full settlement of taxes for the year 1901 and the injunction suit being dismissed. This last amount has been retained by the County.

Thereafter a mandamus suit was instituted to compel the tax collector to commence suit against the appellee for the balance of the 1901 tax, upon the ground that the compromise was void. The Supreme Court held that the Board of Supervisors had no authority to compromise the tax and granted the writ (*Territory* v. *Gaines*, 11 Arizona, 270), in pursuance of which the present action was instituted.

The uncontradicted testimony showed that the raise in the assessment of the eight claims was not based upon evidence as to value and that it was in fact arbitrary, and also that some of the claims were assessed far in excess of their full cash value. The duplicate assessment roll made out by the assessor contained the increase made by the Board of Equalization, the eight claims which were raised being separately itemized by name, with the amounts of the respective increases set opposite the names, but with no statement of their original valuation or the total valuation of them or any of them.

On the third Monday of December, 1901, the tax being unpaid, the tax collector turned in the delinquent list, certified by the Board, giving the property of the defendant as shown in the assessment returned by the appellee, with the increases as they appeared on the duplicate assessment roll.

Under the 1903 law delinquent property was carried

into the back-tax book of that year, and this suit was brought to foreclose the Territory's lien upon the pieces of property therein appearing. That book, which was put in evidence, gave the appellee's property, its total valuation, total tax, amount paid on account and balance due. In enumerating the several tracts remaining unredeemed it showed sixty-five mining claims, containing 636 acres, valued *en masse*, at $3,180 with improvements at $55,431, and named sixty-four claims; the number of acres, and all other valuations for real estate and improvements were the same as in the other lists; and the list of increased valuations of the several claims and improvements were shown, but no total valuation of such separate pieces of property after the addition of the increase was given.

The discrepancies in description of the claims between the complaint and the tax documents are stated, and mention is made that in none of the latter is the total assessed valuation of any individual piece of real estate or the amount of taxes due on any of the separate claims disclosed. And it is said that the testimony of the assessor showed that there were 280 patented mining claims in Cochise County at the time the 1901 assessment was made, and that they were and had been assessed at a uniform rate of $5.00 per acre as a rule.

In its opinion the Supreme Court stated that the most important question raised upon the record was the validity of the action of the Board of Supervisors, sitting as a Board of Equalization, in raising the assessment upon eight of the group of sixty-five claims originally assessed *en masse*. After stating the minutes of the Board's action the court quotes § 2654 of the Revised Statutes of 1887 (p. 209):

". . . The board of equalization shall have power to determine whether the assessed value of any property is too small or too great, and may change and correct any valuation, either by adding thereto or deducting there-

from, if the sum fixed in the assessment-roll be too small or too great, whether said sum was fixed by the owner or the assessor; . . . and the clerk of the board of equalization shall note upon the assessment-roll all changes made by the board. During the session of the board of equalization the assessor shall be present, and also any deputy whose testimony may be required by the parties appealing to the board, and they shall have the right to make any statement touching such assessment, and producing evidence relating to questions before the board, and the board of equalization shall make use of all other information that they can gain otherwise, in equalizing the assessment-roll of the county, and may require the assessor to enter upon such assessment-roll any other property, which has not been assessed; and the assessment and equalization so made shall have the same force and effect as if made by the assessor before the delivery of the assessment-roll to (by) him by (to) the clerk of the board of equalization. . ."

The court said (p. 212):

"It is apparent from an examination of this roll [the duplicate assessment roll] that there are in effect two assessments for the same year against each of the eight claims raised. One, an assessment, commingles with that of sixty-four other claims, *en bloc;* the other, separate and distinct. This is no mere irregularity. The legality of the original assessment as an entirety has been sustained solely upon the ground that the property was so returned by the taxpayer. The board disregarded such return, and the validity of its action must be determined under the statute alone. It might be argued successfully that had the board of supervisors raised the assessment upon the group, such a raise would have been valid. But the board segregated from the group certain claims, and imposed thereon an additional assessment. It is a fundamental rule of taxation in this territory that a taxpayer may pay

upon any one of parcels separately assessed, discharging the lien thereon, without paying upon the remainder. Rev. Stats., 1887, par. 2676.

* * * * * * *

"By the action of which complaint is made here, the board deprived the appellee of this right. Upon the raise being made it had the legal right to determine upon which, if any, of the claims so raised it would pay. If it determined to pay upon none, it was nevertheless obliged to pay a portion of the tax thereon if it exercised its right to pay upon the fifty-seven claims remaining, for the tax collector, under paragraph 2676, *supra* (reenacted, paragraph 3900, Revised Statutes of 1901), could not receive the tax upon less than the entire sixty-five claims, that being the least subdivision appearing on the assessment-roll. If it determined to pay upon one or more of the eight so raised, and to abandon the remainder, it would have to pay the tax upon the raise, together with the tax upon the entire sixty-five claims as originally assessed. The undisputed testimony discloses that these claims were non-contiguous, in instances which would have invalidated an original assessment, except for the return. The board in raising this assessment disregarded the original classification, which has been held good as against the appellee solely by reason of its return. The board of supervisors, sitting as a board of equalization, had no power under paragraph 2654 of the Revised Statutes of 1887 to segregate, from a tract of land returned and assessed as one parcel, a portion thereof and impose thereon an additional assessment, without first determining that such tract was improperly assessed as a whole, and causing such tract to be re-assessed and raised in subdivisions in such manner as to preserve the right of the taxpayer to discharge the lien of taxes upon such of the several separate tracts as he might elect."

It is evident that in reaching this conclusion the Su-

TERRITORY OF ARIZONA AT THE RELATION OF GAINES, TAX COLLECTOR OF COCHISE COUNTY, *v.* COPPER QUEEN CONSOLIDATED MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 89. Argued March 3, 4, 1914.—Decided April 6, 1914.

Where the Supreme Court of a Territory has made a statement of facts in the nature of a special verdict, this court must consider the case when it comes here on appeal upon that finding.

In exercising appellate jurisdiction over the territorial courts in cases involving construction of a statute by the Territory, this court will not, in the absence of manifest error, reverse the action of the territorial court in regard to such construction; and so *held* as to the construction placed by the Supreme Court of Arizona on the statutes of that Territory defining the powers and duties of the Board of Equalization.

preme Court based its decision upon its construction of the statute in this respect. In exercising appellate jurisdiction over the territorial courts, where the construction placed upon a statute of the Territory by the highest court thereof is brought in question, this court has frequently held that it will not reverse the action of the territorial court except in cases where manifest error in such construction appears. *Straus* v. *Foxworth*, 231 U. S. 162; *Phœnix Railway Co.* v. *Landis*, 231 U. S. 578; *Work* v. *United Globe Mines*, 231 U. S. 595. Applying this rule we are not prepared to say that there was manifest error in the conclusion reached by the Supreme Court in construing the statute. Indeed, the appellant in its brief filed in this case extracts from its motion for rehearing in the court below and prints as a part of its argument a statement to the effect that it is convinced that the board could not lawfully segregate the eight claims from the mass and raise the valuation separately, there being no separate assessment originally; but it contends that the value of the whole tract is equal to all its parts, so that when the value of a part is raised it merely increases the aggregate value of the whole tract. We are not prepared to say that the Arizona Supreme Court erred in its conclusion concerning what the Board actually did. The original assessment as the finding shows, contains a return of sixty-five mining claims, naming them as 636 acres of land. There was no separate statement of the amount of acreage in any one claim. The claims were not described except by name, and that as a part of the 636 acres returned as a whole. The Supreme Court found, and we think correctly, that the reassessment picked out eight claims by name and raised the valuation of each by a given sum.

It is further contended by the appellant that certain things have happened as set forth in the findings which amount to an estoppel upon the appellee from denying

the right to have a lien charged, as claimed in this proceeding, upon specific property and to have the lien enforced by the sale of the specific lot or tract covered by it. The statute (part of which is quoted in the margin [1]) is a peculiar one and is said to have been adopted from the statutes of Missouri. It provides for a civil action against the owners of the property, to the end that a lien be charged upon land the taxes on which have become delinquent and that such lien be foreclosed. In Missouri it has been decided that no personal judgment shall be rendered in the proceedings against the owner of the property, nor any execution issue except upon the property charged with the tax. *State ex rel. Rosenblatt* v. *Sargeant*, 76 Missouri, 557; *State ex rel. Hayes* v. *Snyder*, 139 Missouri, 549. And the Supreme Court of the Territory of Arizona held that the construction of the statute by the court of last resort of Missouri was binding upon it.

In such a proceeding it is difficult to see how the principles of estoppel because of the description of the land made by the owner in returning the property or the payment of taxes, as appears from the finding in this case, could have application. Estoppel ordinarily proceeds upon principles which prevent one from denying the truth of statements upon which others have acted where the denial would have the effect to mislead them to their prejudice. In this case the Territory is undertaking to

[1] The judgment, if against the defendant, shall describe the land upon which the taxes are found to be due, shall state the amount of taxes and interest found to be due upon each tract or lot, and the year or years for which the same are due, up to the rendition thereof, and shall decree that the lien of the Territory be enforced, and that the real estate, or so much thereof as may be necessary to satisfy such judgment, interest and costs, be sold, and execution shall be issued thereon, which shall be executed as in other cases of judgment and execution, and said judgment shall be a first lien upon said land. Laws of 1903, pp. 148, 153, Act No. 92, § 88.

collect its revenues by certain statutory proceedings duly provided for that purpose, and it would seem to be elementary that such enforcement of collection must depend upon a valid assessment as its basis, and this again was the holding in Missouri. *City of Hannibal ex rel. Bassen* v. *Bowman*, 98 Mo. App. 103; *State ex rel. Morris* v. *Cunningham*, 153 Missouri, 642. The fact that the taxpayer furnished the list of mining claims which included those upon which increased assessments had been made and thereby acknowledged the ownership of the property by the description stated, would not permit the Board, if authority was wanting, to increase the assessment upon a part of the property by picking out certain claims only, as was done in this case. If for such action the assessment was void, the description furnished by the property owner could not supply the defect. *State ex rel. Flentge* v. *Burrough*, 174 Missouri, 700, 707. Nor do we think there is substance in the claim that the payment made by the appellee estopped it from contesting the lien sought to be imposed in this case. The finding of facts sets forth specifically the payment of the sum of $14,133.12 and of the further sum of $9,589.20 as a condition for granting the injunction in the original suit brought by the appellee in the District Court; and the finding shows that the payment of the sum of $14,133.12 was "on account of any moneys which might ultimately be determined as due from said company for its tax for said year," and that the sum of $5,661.44 was paid on the attempted compromise which was subsequently held to be invalid. We do not find anything in these payments which upon principles of estoppel, or as an affirmation of the validity of the assessment, would prevent the appellee from contending against the legality of the action here in question

In the decision as made in the Supreme Court it was not found necessary to rule upon the attempted defenses based upon the arbitrary character of the assessment, nor

the fact that it was in excess of the cash value of the property. The conclusion which we have reached renders it unnecessary for us to pass upon the findings in this respect, which, notwithstanding the decision in the court below, are placed in the special findings upon which the case is sent here.

Nor do we need to pass upon the alleged violation of the equality protection of the Constitution in the finding that other patented mining claims in Cochise County at the time of the assessment in 1901 were assessed as a rule at the uniform rate of $5.00 per acre. Nor need we consider the ground upon which the Supreme Court of Arizona seems to have acted in part that the assessment rolls and tax book varied from the complaint in the description of the property.

It follows that the judgment of the Supreme Court of the Territory of Arizona must be affirmed.

END

OF

CASE